TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~468.~~ 233 49

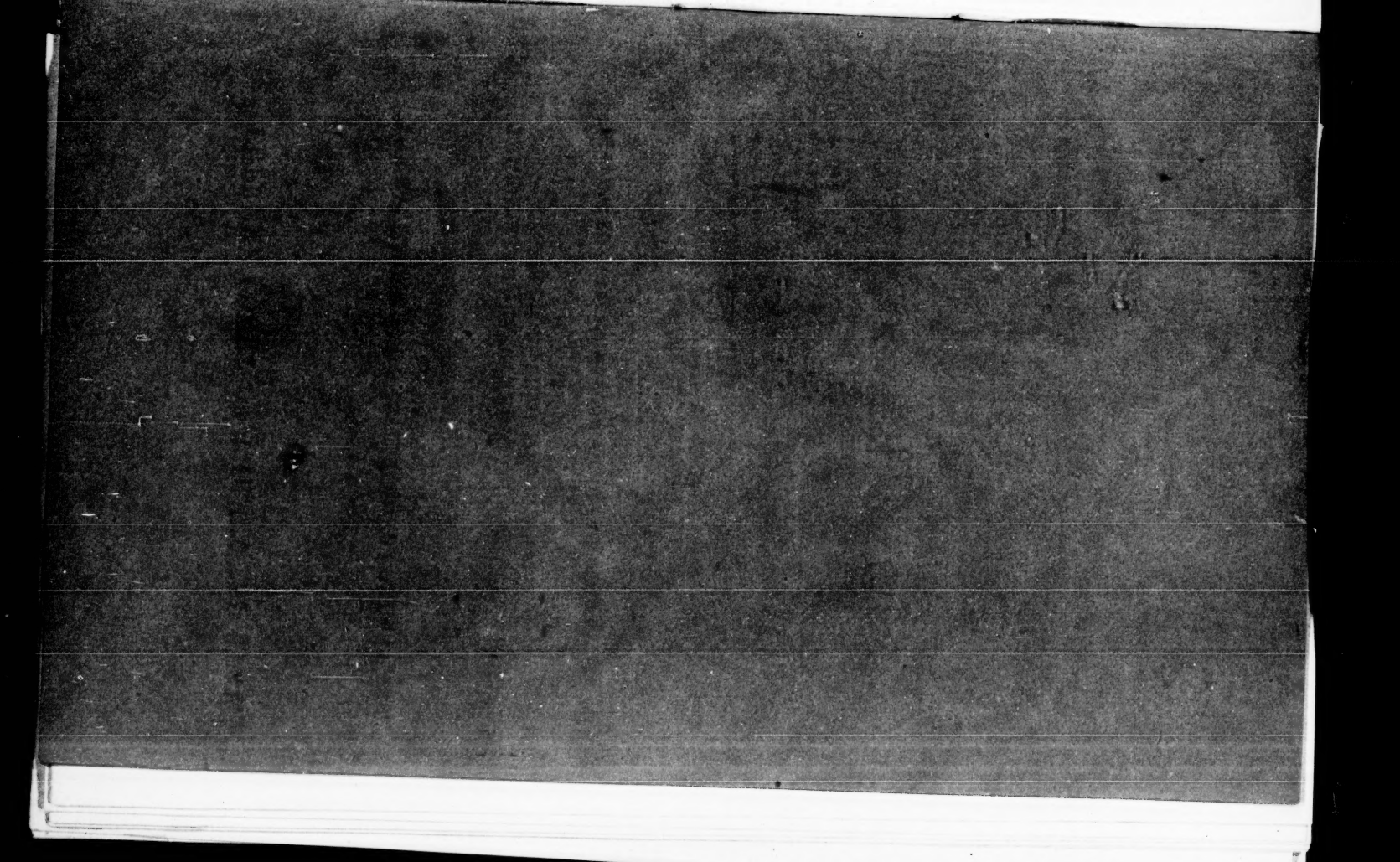
THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE SUPERVISORS OF MARSHALL COUNTY, AND JACKSON REED, SHERIFF OF SAID COUNTY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MAY 22, 1869.



SUPREME COURT OF THE UNITED STATES.

No. 468.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE SUPERVISORS OF MARSHALL COUNTY, AND JACKSON REED, SHERIFF OF SAID COUNTY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

INDEX.

	Original.	Print.
Petition for writ of error	*A*	1
Allowance	*B*	1
Writ of error	*C*	2
Citation	*D*	3
Copy of bond	*E*	3
Petition	3	4
Bill of injunction	15	11
Amendment of bill	21	16
Answer of supervisors to bill of injunction	24	18
Cross-bill	31	23
Amended bill	34	26
Answer of Baltimore and Ohio Railroad Company	36	27
Answer to amended bill	44	33
Decree	46	35
Agreement	47	36
Dividends declared	48	37
Preamble and resolution	49	38
Deposition of John King, jr	50	39
Deposition of Joshua I. Atkinson	54	42
Statements	57	44
Writ of supersedeas	67	51
Return	69	52
Bond	69	52
Hearing	72	53
Judgment	73	53
Opinion	75	54
Clerk's certificate	87	63

A To the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States:

The petition of the Baltimore and Ohio Railroad Company, a corporation and body politic created by the State of Maryland, and also by the State of Virginia, prior to the division of that State into the two States of Virginia and West Virginia, respectfully sheweth:

That on the 9th day of April in the year 1867, a decree was pronounced by the circuit court of Marshall county, in the said State of West Virginia, in a suit therein depending, in which your petitioner was complainant, and the supervisors of said county and Jackson Reed, the sheriff thereof, were defendants in which your petitioner set up and claimed an exemption under the Constitution of the United States, the construction of which instrument was thereby drawn in question, and in which suit the decision was against the exemption, so claimed as aforesaid, which decision was afterwards, on the 26th January, 1869, affirmed by the supreme court of appeals of West Virginia, on the appeal of your petitioner; all which appears by a copy of the record duly certified herewith.

That in said suit, your petitioner sought to obtain an injunction restraining the appellees from proceeding, under colour of certain legislation of the State of Virginia aforesaid, to levy or distrain upon the property of your petitioner for the amount of certain State, school, and county taxes, and asked for the decree of the court declaring the property of your petitioner exempt from all taxation under the charter creating your petitioner, obtained from the State of Virginia aforesaid and the supplements thereto, the obligation whereof said proceedings necessarily impaired.

Wherefore your petitioner prays your honour to allow a writ of error to the said supreme court of appeals of West Virginia, being the highest court of law of said State in which a decision of said suit could be had, for the correction of the error aforesaid, and the reversal of said judgment according to the form of the statute in such cases made and provided.

January 27, 1869.

JOHN H. B. LATROBE,
Of Counsel for the Petitioner.

B (Indorsed:) Petition for writ of error to the supreme court of appeals of West Virginia, in the case of the Baltimore & Ohio Railroad Company vs. the supervisors of Marshall county, and Jackson Reed, sheriff of said county.

Writ of error allowed as prayed within.

S. P. CHASE,
Ch. Jus. U. States.

A To the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States:

The petition of the Baltimore and Ohio Railroad Company, a corporation and body politic created by the State of Maryland, and also by the State of Virginia, prior to the division of that State into the two States of Virginia and West Virginia, respectfully sheweth:

That on the 9th day of April in the year 1867, a decree was pronounced by the circuit court of Marshall county, in the said State of West Virginia, in a suit therein depending, in which your petitioner was complainant, and the supervisors of said county and Jackson Reed, the sheriff thereof, were defendants in which your petitioner set up and claimed an exemption under the Constitution of the United States, the construction of which instrument was thereby drawn in question, and in which suit the decision was against the exemption, so claimed as aforesaid, which decision was afterwards, on the 26th January, 1869, affirmed by the supreme court of appeals of West Virginia, on the appeal of your petitioner; all which appears by a copy of the record duly certified herewith.

That in said suit, your petitioner sought to obtain an injunction restraining the appellees from proceeding, under colour of certain legislation of the State of Virginia aforesaid, to levy or distrain upon the property of your petitioner for the amount of certain State, school, and county taxes, and asked for the decree of the court declaring the property of your petitioner exempt from all taxation under the charter creating your petitiorer, obtained from the State of Virginia aforesaid and the supplements thereto, the obligation whereof said proceedings necessarily impaired.

Wherefore your petitioner prays your honour to allow a writ of error to the said supreme court of appeals of West Virginia, being the highest court of law of said State in which a decision of said suit could be had, for the correction of the error aforesaid, and the reversal of said judgment according to the form of the statute in such cases made and provided.

January 27, 1869.

JOHN H. B. LATROBE,
Of Counsel for the Petitioner.

B (Indorsed:) Petition for writ of error to the supreme court of appeals of West Virginia, in the case of the Baltimore & Ohio Railroad Company vs. the supervisors of Marshall county, and Jackson Reed, sheriff of said county.

Writ of error allowed as prayed within.

S. P. CHASE,
Ch. Jus. U. States.

C UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore and Ohio Railroad Company, appellant, and the supervisors of Marshall county and Jackson Reed, sheriff of said county, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Baltimore and Ohio Railroad Company, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-eight.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

I, the undersigned, clerk of the supreme court of appeals of West Virginia, hereby certify that a copy of the within writ of error was lodged in my office on the 30th day of January, 1869, for the defendant in error therein named.

Given under my hand and the seal of the said court, the 13th day of February, 1869.

[SEAL.] SYLVANUS W. HALL, *Clerk.*

UNITED STATES OF AMERICA, *to wit:*

Before me, the undersigned, on this 13th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared George H. Lee, and made oath that on the 30th day of January, 1869, he lodged a copy of the within writ of error in the clerk's office of the supreme court of appeals of West Virginia, for the defendants in error therein named.

GEO. H. LEE.

Sworn to and subscribed this 13th February, 1869.

HANNIBAL FORBES,
U. S. Com'r.

D The United States of America to the supervisors of Marshall county and Jackson Reed, sheriff of said county, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein the Baltimore and Ohio Railroad Company is plaintiff in error, and you are defendan in error, to show cause, if any there be, why a decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

S. P. CHASE,
Ch. Jus. U. States.

On this 13th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared Samuel B. McColloch before me, the subscriber, Hannibal Forbes, commissioner of the district court of the United States for the district of West Virginia, and makes oath that he delivered a true copy of the within citation to John Gorrell, president of the board of supervisors of Marshall county, in person, on the 30th day of January, 1869; and that on the same day he delivered another true copy to John M. Turner, clerk of said board, in person; and that on the 1st day of February, 1869, he delivered another true copy of the same to the within-named Jackson Reed; all three being at the time of such service in said county of Marshall.

SAMUEL B. McCOLLOCH.

Sworn to and subscribed the 13th of February, A. D. 1869.

HANNIBAL FORBES,
U. S. Com'r.

E Know all men by these presents, that we, John W. Garrett and John H. B. Latrobe, are held and firmly bound unto the supervisors of Marshall county, in the State of West Virginia, and

Jackson Reed, sheriff of said county, in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated this 28th day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas at a circuit court of said county of Marshall, in the State aforesaid, in a suit depending in said court between the Baltimore and Ohio Railroad Company, complainant, and the supervisors of Marshall county and the said Jackson Reed, aforesaid, defendants, a decree was rendered against the said complainant, and the said decree was afterwards affirmed in all things by the supreme court of appeals of West Virginia, on the 26th day of January, in the year 1869, and the said complainant having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said complainant shall prosecute the said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN W. GARRETT. [L. S.]
(Signed) JNO. H. B. LATROBE. [L. S.]

Sealed and delivered in presence of—
JAS. H. MCKENNEY, as to J. H. B. Latrobe.
Approved by

S. P. CHASE,
Ch. Jus. U. States.

3 Supreme court of appeals of West Virginia, Wheeling.

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
THE SUPERVISORS OF MARSHALL COUNTY. } Petition.

To the honorable the judges of the supreme court of appeals of West Virginia:

The petition of the Baltimore & Ohio Railroad Company, incorporated under the laws of the States of Maryland and Virginia, respectfully represents:

That on the 9th day of April, 1867, a decree was pronounced by the circuit court of Marshall county, in a cause therein depending, in which your petitioner was complainant, and the supervisors of the county of Marshall and Jackson Reed, sheriff of said county, were defendants; a transcript of the record of which said decree your petitioner now here prefers to your honors with this petition.

4 Upon examination of said transcript, your honors will find that the object of said suit, on the part of this petitioner, was to have tested and determined the right of the State of West Virginia, and of the several counties in which the road of your petitioner passed, to levy and collect State, school, and county taxes upon property held and used in the name of your petitioner, for the purpose of working the said road and carrying out the legitimate objects for which the company was incorporated; your petitioner denying the existence of any such right on the part of either the State or county authorities, and deeming that, under the laws constituting its charter, it was wholly exempt at the time from taxation for any purpose, and of any kind whatever. The case was commenced by a bill on the part of your petitioner, praying an injunction to all proceedings on the part of the defendant to levy for and collect a large sum, amounting, as it would seem, to $7,591 50, claimed as due from your petitioner to the State of West Virginia, and to the county of Marshall, for State, school, and county taxes, lawfully imposed upon your petitioner for the year 1864. After setting out the original charter granted to your petitioner by the State of Maryland, and subsequently ratified and confirmed by the State of Virginia, and referring to various acts of the general assembly of the latter, subsequently passed, an amendment of an act referring to the original act in relation to your petitioner, the bill assigns the grounds upon which your petitioner claimed the exemption from taxation of all kinds contended for. It was claimed that under the twenty-third section of the act establishing general regulations for the incorporation of railroad companies, passed 11th March, 1837, to which act your petitioner was expressly declared to be subject by the sixth section of an act passed on the 6th of March, 1847, and accepted by your petitioner, the property and profits belonging to a railroad company were expressly vested in the several stockholders in proportion to their respective shares, and declared to be personal estate; and thus that such

5 property and profits could only be assessed and taxed in the names of the stockholders themselves, in proportion to their respective shares, and could not be so assessed and taxed in the corporate name of the company.

It was further claimed that under the seventh section of the said act of the 6th of March, 1867, which was the only provision by which the absolute and unconditional exemption from all taxation contained in the original charter granted by the State of Maryland, and ratified by the State of Virginia, had been, in any manner, or to any extent, qualified or restricted, it was clearly the intention of the legislature, by some future act or proceeding, to determine when the period had arrived at which the qualification to the total exemption from taxation, secured to your petitioner by its charter, should take effect; and that until such action should be taken by the legislature, the exemption from all taxation was, and was intended to continue; and it was alleged that no such action had then, as yet, been taken by any competent legislation, either of the State of Virginia or of that of West Virginia.

It was further claimed that when the time should arrive at which your petitioner might be subject to taxation, and should be so declared by competent authority, yet that the only taxation to which it could be subject was general taxation for State purposes; and that in no court under the provisions of the acts referred to would it be subject to local or county taxation which might be special and peculiar, and therefore unequal and unjust.

And generally it was claimed that under the law and the facts as they existed up to the year 1864, inclusive, any attempt on the part of the State or county anthorities to assess and levy upon your petitioner taxes, whether for general State purposes or local county uses, was plainly in violation of the rights vested in your petitioner under its charter, and the acts of the general assembly of Virginia in relation thereto, and in controversion of the Constitution of the United States. [See the bill commencing at p. 1 of the record.]

6 The injunction prayed for was allowed on the 13th December, 1865.

On the 6th of April, 1865, the defendants plea their answer to the bill, on which they traverse generally the matter of law and fact on which the claim to relief set up in the bill is founded, and insist that under the law, as construed by them, your petitioner was subject to taxation in the year 1864; that the assessment made for that purpose was proper and legal, and claim the right to proceed and collect the amount of the taxes claimed for State and county purposes as therein stated. [See the answer commencing on p. 15 of the record.]

At the June term, 1865, of the said court, your petitioner obtained leave to amend his bill, and the amendment was filed. In this, a further and additional ground is alleged upon which your petitioner's claim to exemption from taxation could be sustained. Referring to the seventh section of the act of March 6th, 1867, by which alone the exemption from taxation secured to your petitioner by its original charter was in respect qualified, and which declares that the taxing power therein reserved over the property and profits of your petitioner should not be exercised unless and until the nett profits of your petitioner, accrued within the State of Virginia, should exceed the rate of six per centum per annum upon its capital invested in said State. The amended bill alleges that the nett profits so accrued had not, prior to the first of February, 1864, exceeded the rate aforesaid, and that therefore, by the very terms of said section, the liability to taxation thereby contemplated had not then accrued; and it alleged that taxes for any purpose could not yet be demanded of your petitioner consistently with the rights secured to it under the different acts of the State of Virginia by which its functions were created. This amended bill was sworn to by an officer of the company, and will be found at p. 29 of the record.

The defendants answered this amended bill at the June term,

7 1865. They deny that they had any knowledge or belief upon the question, whether the nett profits of the company within the State of Virginia, or West Virginia, had exceeded the rate of six per centum per annum on the capital invested within said State or the

contrary; and they, therefore, do not admit the allegations of the amended bill in that respect. And they deny the exemption from taxation claimed under any law whatever of the said State of Virginia. [See this answer, p. 45.]

When the defendants filed their answer to the original bill, they obtained leave to file a cross-bill, in the nature of a bill of discovery, in which they called upon your petitioner to discover, through its president and secretary, the amount received by your petitioner for nett income from its said road for the year 1856, and each subsequent year; and also to produce the books, papers, and accounts in their possession, or under their control, from which such income, and the capital, during the year aforesaid, might be ascertained. [See their bill commencing on p. 25 of the record.]

Your petitioner demurred to this bill, assigning for cause, that as it sufficiently appeared from the bill of your petitioner, and the answer of the defendants thereto, which were both made part of this bill of discovery, that your petitioner had been made, in all respects, subject to the provisions of the act of the 11th of March, 1837, establishing general regulations for the incorporation of railroad companies, with respect to that portion of its road, there or thereafter, to be constituted within the State of Virginia; and that by the 23d section of the last-named act, the property and profits which should accrue from the same should be vested in the several stockholders, in proportion to their respective shares, and should be deemed personal estate. The officers of the Baltimore & Ohio Railroad Company were not bound to list for taxation the property and credits of said company, or to perform any of the other acts required of railroad companies by the 52d section of the act, entitled "An act to provide for the assessment of taxes," passed December 3d, 1863. [See this demurrer, p. 31.]

8 Your petitioner, together with J. W. Garrett, president, and J. I. Atkinson, filed their joint and several answers to the bill of discovery. They exhibited statements from the books of the company, showing the amount of capital invested, and of nett income of the company, in each year from the 30th of September, 1855, to the 30th of September, 1862, the thirtieth of September being the termination of the fiscal year of said company; and they state the results of such statements, expressing their belief in their correctness. They also state why they are not able to give any statements of income or capital invested after the last-named day. They allege that far the greater part of the revenue of the said road was earned beyond the limits of the State of West Virginia, to wit, in the State of Maryland and the District of Columbia. They explain the thirty per cent. extra dividend referred to in the cross-bill, by showing that it was not because the nett earnings of the road had exceeded six per centum per annum upon the capital invested, but because a large amount thereof had previously been applied to construction of the road for series of years instead of being paid to the stockholders, and was in this form only so much money returned to them as money borrowed. They also explain the dividends of seven per centum declared

in the years 1851 and 1852, by showing that they were not dividends upon the capital invested in said company, but upon the capital stock of the company, and were not equal to six per centum upon the capital actually invested. They also show that the sums stated as surplus in the profit and loss account referred to in the cross-bill did not represent a surplus revenue out of nett income previously accrued, but in fact represented items forming a part of the invested capital of the said company. They insist that the nett income of the company upon the capital invested in the State of Virginia never did at any time prior to the 1st of February, 1864, exceed the rate of six per centum per annum. That said company was, therefore, exempted from taxation under the law, and was not bound to make the
9 return required by the fifty-second section of the act of December 3d, 1863, and that such exemption was a vested right secured to said company under the Constitution of the United States; and so the assessor of the county of Marshall was not authorized to assess and charge taxes upon the property of the company, nor had the supervisors and sheriff any authority to collect the same.

By written agreement between the parties filed in the of cause, the printed annual reports of the president and director the Baltimore & Ohio Railroad Co. were to be received as evidence in the cause, to have the same effect as if proven, and either party was authorized to produce and read any portion of such printed reports, either in the circuit court or an appellate court. The resolution of the 1st of December, 1856, declaring the extra dividend of thirty per centum, with the preamble thereto, explanatory thereof, was also made a part of the record, as was also a table showing the total revenue of the company, expenses, interest, dividends paid and received, and the nett profits used in construction during the twenty-six years ending 30th September, 1856. It was also agreed that a report of a committee of the directors of the company, dated 1st December, 1856, upon the proposition to return the balance of nett earnings from the main stem of the road, might be read as evidence upon the hearing of the cause.

The depositions of J. King, jr., and J. I. Atkinson, officers of the company, were taken and filed on its behalf for the purpose of proving that the nett income upon the capital invested in the State of Virginia, and after its creation in the State of West Virginia, had never exceeded the rate of six per centum per annum. It is submitted that these depositions so prove the fact to be.

At the April term, 1867, of the said court, the cause came on to be heard upon the bill and amended bill, answers thereto and replications to the same, the cross-bill of discovery filed and the
10 demurrer and answer thereto, the depositions of the witnesses, with the exhibits and statements annexed, the agreement in writing filed and the papers, written and printed, therein mentioned, the preamble and resolution of the 17th December, 1856, declaring the extra dividend of thirty per cent., the assessment against your petitioner by the assesor of Marshall, and the various acts of the legislature of Virginia concerning the Baltimore & Ohio Railroad

Company; whereupon the court pronounced its opinion to be that your petitioner was not entitled to the exemption from taxation, either State or county, claimed by it, and accordingly dissolved the injunction awarded your petitioner, and dismised the bill and amended bill with costs to the defendants.

Your petitioner is much aggrieved by this decree, and is advised that the same is erroneous; and for cause of error in the same, your petitioner, according to the statute, will here assign and set down:

1st. The Baltimore & Ohio Railroad Company having been, by the act of the 6th of March, 1847, which was accepted by said company, declared subject in all respects to the act establishing general regulations for the incorporation of railroad companies, passed March 11th, 1837, and by the 23d section of the last-named act, it being declared that the property and profits of a railroad company should be vested in the several stockholders thereof, in proportion to their respective shares, and declared to be personal estate. It follows that the property and profits of your petitioner (company) could only be assessed and charged with in the names of the several stockholders in whom the same was vested, in proportion to their respective shares, and could not be so assessed and charged in the name of the company on which said property and profits were not vested.

2d. If the property and profits in possession of your petitioner for the benefit of the stockholders, who were the owners thereof under the law, could be at any time assessed and charged with taxes
11 in the name of your petitioner, yet that under the 6th section of the act of March 6th, 1847, which created the only qualification to the total exemption from taxation granted by the original charter of the company, the taxing power thereby reserved was only to be exercised when and after the nett income upon the capital invested in the State of Virginia, and after its creation in the State of West Virginia, should exceed the rate of six per centum per annum, and upon the pleadings and proofs in the cause, it is not made to appear that such nett income has exceeded the rate of six per centum per annum upon the capital invested in said State; and so that the time has not yet arrived at which, nor has the condition happened upon which, the said taxing power could lawfully be exercised over the said property and profits.

3d. It is clear from the said act last referred to, that before the said taxing power was to be exercised, it was the intention of the legislature that it should be first ascertained and declared, by act or resolution of that body, or by some other appropriate method under its authority, that the condition had happened upon which the taxing power might lawfully be exercised; and it was not to be left to the local officer of any one of the counties through which the road passed to take upon himself the duty of determining that question. No such act or resolution was ever passed by the legislature of Virginia, or by that of West Virginia, nor was it ever ascertained by any competent authority under either that the nett profits of the road had reached the point at which taxation might commence.

4th. The condition upon which the taxing power might lawfully be exercised over their subject not having yet happened, or not having

been declared to have happened by legislative act or authority, your petitioner was not bound to make the return required by the 52d section of the act of December 3d, 1863, providing for the assessment of taxes; and the act of the assessor of Marshall county,
12 in charging and assessing your petitioner with taxes for want of such return, was unauthorized and void, in plain violation of the rights secured to your petitioner by its charter, and in contravention of the Constitution of the United States.

5th. Before dissolving the injunction the court should have directed a reference to a commissioner, or an issue to be heard by a jury, for the purpose of ascertaining whether the nett income of the road had exceeded the rate of six per centum per annum upon the capital invested in the State of Virginia, or West Virginia, prior to the 1st of February, 1864, or otherwise; and until a report or verdict in the affirmative, the said injunction should have been continued.

6th. If the property and profits in the hands of your petitioner, belonging to the stockholders of the company, was liable to taxation at all, it was only liable, under the 7th sec. of the act of March 6, 1847, to general taxation for State purposes, which might be equal and uniform, and was not liable to local taxation for county purposes, which might be special, and therefore unequal and unjust. And so the said circuit court should at least have restrained the collection of the heavy levies for county purposes, made by the supervisors of said county, if it was rightfully dissolved as to the State and school taxes, claimed on the part of the State.

For these and other causes of error, apparent on the face of said decree, your petitioner prays that an appeal may be allowed from said decree, with a supersedeas, that the whole matter may be reheard in your honorable court, and that said decree may be reversed and annulled, and such other decree rendered as may be just and proper.

And, as in duty bound, your petitioner will ever pray, &c.

BALTIMORE & OHIO RAILROAD CO.,
By its Counsel.

I, undersigned, one of the counsel practising in the supreme court of appeals of West Virginia, certify that I am humbly of
13 opinion the decree complained of in the foregoing petition should be reviewed in the said court of appeals.

GEO. H. LEE.

MAY 24*th*, 1867.

Appeal allowed, with supersedeas, to take effect on the petitioner, or some one for it, giving bond, with sufficient security, residing in this State, in the penalty of fifteen thousand dollars, conditioned to pay the taxes and levies in the bill mentioned, with the interest lawfully accrued thereon, and all costs and damages that may be awarded against the petitioner, in case the said decree shall be affirmed.

WM. A. HARRISON.

MAY 30*th*, 1867.

To the clerk of the supreme court of appeals of West Virginia.

15 *Record.*

THE STATE OF WEST VIRGINIA, *Marshall county, ss:*

Pleas at the court-house of Marshall county, before the judge of the circuit court for said county of Marshall, on the 9th day of April, in the year 1867.

Be it remembered, that heretofore, to wit, on the 13th day of December, 1864, the Baltimore and Ohio Railroad Company presented their bill of complaint against the board of supervisors of the county of Marshall and Jackson Reed, sheriff of said county, to the judge of the circuit court of said county, and obtained from the said judge an injunction to restrain, &c., which bill of complaint and order of injunction are in the following words and figures, to wit:

Bill of injunction.

To the Hon. E. H. Caldwell, judge of the circuit court of Marshall county:

Respectfully complaining, showeth unto your honor, the Baltimore & Ohio Railroad Company, a corporation and body politic:

That the complainant was incorporated and made such body politic by an act of the general assembly of the State of Maryland, entitled "An act to incorporate the Baltimore & Ohio Railroad Company," passed on the 28th of February, 1867, for the purpose of constructing a railroad from Baltimore to some point on the Ohio river. A copy of said act of assembly is herewith exhibited as part hereof.

That by the eighteenth section of said act, as your honor will observe, it is provided that the shares of the capital stock of the said company should be deemed and considered personal estate, and should be exempt from the imposition of any tax or burden by the States assenting to this law.

16 That by an act of the general assembly of Virginia, entitled "An act to confirm a law passed at the present session of the general assembly of Maryland, entitled an act to incorporate the Baltimore & Ohio Railroad Company," (which said Virginia act passed on the 8th of March, 1827,) it was declared that the same rights and privileges should be, and were thereby, granted to the said company, within the ter- [page 2] ritory of Virginia, as were granted within the territory of Maryland. Said act contains various provisions in relation to the powers, duties, and liabilities of said company; the rights reserved to the State and citizens of Virginia; the terminus of the road and mode of construction: all of which by the said act, reference thereto being had, will more fully and at large appear.

That said acts of incorporation were regularly and duly accepted by said company, which thereafter proceeded, under and by virtue of the same, to commence and prosecute the construction of the said road in the States of Virginia and Maryland, as required by said acts, upon a line selected and located by their engineers.

This complainant further showeth unto your honor, that said company, not being able to complete the construction of said road to the Ohio river within the time contemplated by the original acts of incorporation, subsequent acts were passed by the general assemblies of both said States, giving further time for the completion thereof, upon the terms and conditions thereof.

That by an act of the general assembly of the State of Virginia, entitled "An act to authorize the Baltimore & Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," passed the 6th of March, 1847, the said company was authorized to complete [page 3] said road to the city of Wheeling, on the Ohio river, upon a route to be determined in the manner provided for in the said act.

By the sixth section of this act the company was declared to be subject to the provisions of the act of that State passed on the 11th of March, 1837, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road then or thereafter to be constructed within the said commonwealth of Virginia, so far as the same were properly applicable.

By the seventh section it was declared that the stock, property, and profits of the said company, so far as the same might be, or accrue within said commonwealth, should be subject to general taxa-
17 tion in like manner, and on the same footing with other similar companies within the State; provided, however, that such taxing power should not be exercised unless and until the net income of said road should exceed six per centum per annum upon this capital invested. This act was duly and regularly accepted by the said complainant, within the time therein specified for such acceptance; and the construction of the road commenced and completed to the city of Wheeling, upon the prescribed route, within the periods limited for such commencement and completion; and after its completion, the complainant proceeded to stock and equip the said road, and to work the same for such profits as it might reap from the enterprise on due and legitimate trade, and have continued so to do to the present time.

This complainant further showeth to your honor, that by the twenty-third section of the said act prescribing [page 4] general regulations for the incorporation of railroad companies, and to the provisions of which this company was made subject, as aforesaid, it is declared that all machines, wagons, vehicles, or carriages belonging to any company incorporated subject to the provisions of that act, together with all their works, and all profits which should accrue from the same, should be vested in the respective stockholders forever, in proportion to their respective shares, and should be deemed personal estate.

This complainant is advised that upon the true construction of the clause in its original character, exempting it from any tax or burden, all the property of the company, of whatever description, was exempted from taxation of any kind, whether general for State purposes or of local imposition by any county or city authorities for its

municipal purposes; and that said original act of incorporation remains in force as the charter of the company in Virginia, except so far as it has been modified by subsequent legislation.

And this complainant is further advised that said clause of exemption in said original charter has never been otherwise changed or modified, except so far as it may have been by the said seventh section of the act of the 6th of March, 1847, which subjects the company to general taxation, as other similar companies, upon the contingency therein specified.

And this complainant is further advised that the general taxation to which said company was thus made subject by said seventh section upon the contingency therein named, [page 5] was taxation to be imposed and regulated by the legislature of the State for general State purposes, as contra-distinguished from the city or county
18 taxation for local municipal purposes, which might be special or peculiar, and therefore unequal and unjust.

And this complainant is further advised, that upon the true construction of said seventh section, the taxing power therein reserved, was reserved to be exercised by the legislature by some future act, and was not intended to be exercised until the legislature had, by some proper proceeding, ascertained and declared that the profits of the said company had reached the point at which it became liable to taxation, and that the said company should thereafter be assessed with such taxes as it might be liable to pay, and required to pay the same in like manner, and on the same footing with other similar companies in the State. And that it was not intended that a mere local revenue officer or assessor of taxes in any county through which the road passed, should, upon his mere authority, undertake to decide when the said company had become liable to taxation under the provisions of said act, and, at his discretion, without further warrant from the legislature, proceed to assess the property of the company for taxation upon the revenue books of his county, and thus subject the property of the company to distraint by the sheriff or collector of [page 6] taxes in such county, to enforce payment of the same, whether the company was bound under the law to pay the same or otherwise.

And this complainant is further advised, that upon the true construction of the said seventh section of the act of the 6th of March, 1847, the taxing power therein reserved is not, and was not intended to be, exercised until and unless the net income or profits accruing and derived from that portion of the said road, and the working of the same within the limits of the commonwealth of Virginia, should exceed the rate of six per centum per annum upon the capital invested within said commonwealth; and that the profits or income therein referred to did not mean the total profits or income derived from working the entire line of road as well that portion of the same in Maryland as that in Virginia.

And this complainant is further advised, that under said twenty-third section of the said act of the 11th of March, 1837, prescribing general regulations concerning railroad companies, and to which said

company was made subject as aforesaid, if the time had arrived at which the property of the company was liable to taxation, and the same had been so declared by competent authority. Yet, as all the profits and property of the company was vested in the respec-
19 tive stockholders forever, in propoportion to their respective shares, and to be deemed peronal estates, the same should be assessed for taxation to, and in the names of, the stockholders themselves, in proportion to their shares, and not to and in the name of said company. By reason of which promises this complainant had well hoped that it would have been permitted to enjoy the franchise and privileges thus granted to it by the State of Virginia, without let or mo- [page 7] lestation on the part of said officers of said State, or of the State of West Virginia, after its foundation, and without any attempt on their part, or the part of any of them, to demand or enforce payment of taxes of any kind from said company, until it thereby became liable to taxation, and was so declared to be by competent authority. But in this most reasonable expectation, this complainant has been disappointed. For this complainant showeth and charges that within the present year, and whilst the property and profits of the company was still wholly exempt from taxation of any kind, as it is advised under the laws aforesaid, one George Pelly, assessor of the first and upper districts of the county of Marshall, in defiance of the said company's right to exemption from taxation under said laws, has undertaken to assess, and has assessed, upon the revenue books of said county, property to the amount of three hundred and fifteen thousand dollars ($315,000) as belonging to said campany within said county, and as liable to general State and county taxation in the same manner and on the same footing as the property in said county not so exempt from taxation; and the said assessor has charged the said company upon said books with the general State tax at the rate of thirty cents on the hundred dollars value thereof, amounting to nine hundred and forty-five dollars, ($945;) also, with the school tax on the same, amounting to three [page 8] hundred and fifteen dollars, ($315;) and the supervisors of said county have, by an order of their board, made a levy of six hundred and seventy-five per centum on said State tax for county purposes, amounting to the sum of six thousand three hundred and seventy-eight dollars and seventy-five cent ($6,378 75) if the "State tax" referred to in the order of the board of supervisors excludes the tax for schools, or to eight thousand five hundred and five dollars ($8,505) if it includes it; and said sums are thus claimed and demanded of the complainant for State, school, and county taxes upon the property held by it within the county of Marshall, for the present year. This complainant herewith exhibits an official certifi-
20 cate from the clerk of the board of supervisors of the said county of Marshall, showing the amount of said assessment, and of said State taxes charged on said property, and of that levied by the said board for county purposes, which said certificate, marked "A," it prays may be taken and received as part hereof.

And now, so it is, may it please your honor, the supervisors of the county of Marshall are claiming from this complainant the amount

of the levy thus laid by them, at the rate aforesaid, upon the property thus assessed by said assessor, in the county of Marshall, and the sheriff of said county, under color of his office, is demanding of this complainant and its agents, the amount of said levy for the use of said supervisors for county purposes. And also, the amount of said State tax and school tax; and as the said sheriff is authorized and required by law to collect all taxes charged upon the [page 9] revenue books, and also all such levies as shall be made by order of the supervisors upon the property assessed upon said books, this complainant has reason to apprehend, and does apprehend, that he will proceed to enforce payment of said State and school taxes and county levies by distraint and sale of this complainant's property, notwithstanding its just and well-founded claim to exemption from taxation, and from all proceedings to enforce it. All which is in violation of the vested rights of this complainant under the several acts aforesaid, constituting its charter and in contravention of the Constitution of the United States, and contrary to equity and good conscience, fraudulent as it respects this complainant, and tends manifestly to its injury and oppression.

In tender consideration whereof, and inasmuch as this complainant is remediless in the premises by the strict rules of the common law, and only and properly relievable in a court of equity, it prays that the supervisors of the county of Marshall and Jackson Reed, sheriff of said county, may be made defendants to this bill, and may answer the same on oath; that an injunction be awarded to restrain the said defendant, their servants and agents, and the deputies of said sheriff from proceeding to levy upon, or distrain the property of this complainant, for the amount of said State, school, and county taxes, or any part thereof, or otherwise to collect the same, until the further order of this court; that the premises con- [page 10] sidered, a decree may be produced declaring this complainant's rights to be exempted from all taxation; that said injunction to the collection of said State, school, and county taxes for the present year, may be made perpetual; and that the complainant may have such
21 other, further, and general relief in the premises as the nature of its case requires, and as may be consistant with the rules of equity.

May it please your honor to grant a subpœna, &c.

J. W. GARRETT,
President of the Balt. & Ohio Railroad Company.
B. DESPARD, *Counsel.*

STATE OF MARYLAND, *City of Baltimore, to wit:*

Before the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore city, duly authorized to administer an oath, personally appeared on this third day of December, in the year eighteen hundred and sixty-four, John W. Garrett, president of the Baltimore & Ohio Railroad Company, and made oath that the matters and facts stated in the foregoing bill of complaint are true to the best of his knowledge and belief.

JNO. SHOWACRE, *J. P.*

[U. S. Stamp.]

I, Alford Mace, clerk of the superior court of Baltimore city, the same being a court of record of the State of Maryland, do certify that the signature of John Showacre, the—[page 11] peace before whom the foregoing affidavit was taken, is genuine, and that the said John Showacre had the authority to administer said oath.

Witness my hand and the official seal of the said superior court for Baltimore city, this third day of December, in the year eighteen hundred and sixty-four.

[OFFICIAL SEAL.] ALFORD MACE,
Clerk of Superior Court of Baltimore City, Md.

[U. S. Stamp.]

Amendment of bill.

To the Hon. E. H. Caldwell, judge, &c:

This complainant, by way of amendment to the foregoing bill, begs leave to state that by a mere mistake, or inadvertence,
22 the amount of levy made by the supervisors of Marshall county for county purposes, is stated to be six hundred and seventy-five per centum on the State tax instead of six hundred and seventy per centum, which is shown to be the exact rate of said levy by the official signature of the clerk herewith exhibited.

This complainant therefore prays that the said mistake may be corrected, and the said bill amended so as to state the said levy to be six hundred and seventy per centum on said State tax, and to reduce the amount of said levy five per centum below that stated in said bill.

And the complainant will ever pray, &c.

B. DESPARD, *Counsel.*

Injunction.

Injunction is granted the complainant, upon its entering into bond, or some one for the complainant, with [page 12] sufficient surety, in the penalty of fifteen thousand dollars, conditioned according to law, and the clerk will endorse an order on the subpœna to be issued by him, restraining the board of supervisors of Marshall county, its agent or collectors of taxes and county levies, and Jackson Reed, sheriff of said county, from proceeding to levy upon or distrain the property of the complainant, for the amount of the taxes for State, school, and county purposes assessed and charged against the complainant upon the tax-books of said county, for the year 1864, or any part thereof, or otherwise to collect the same until the further order of the court be had in the premises.

E. H. CALDWELL,
Judge of the First Judicial Circuit of West Virginia.

DEC. 13*th*, 1864.

To Harrison Riggs, clerk of the circuit court of Marshall county:

The condition of the bond above mentioned should be to prosecute the said injunction with effect, or in case the same be dissolved, to

pay the said taxes and county levies, with all such costs and damages as may be awarded the defendants, or either of them, by reason of the suing forth this injunction.

E. H. CALDWELL, *Judge, &c.*

23 *Exhibit "A" in bill of injunction.*

I, J. M. Turner, clerk of the board of supervisors of the county of Marshall, West Va., do hereby certify that George Pelly, assessor for the first and upper assessor's district in said county, has assessed the property of the Baltimore & Ohio Railroad Company at $315,000; the State tax is thirty [page 13] cents on the hundred dollars, which amounts to $945; the school tax on the same, which is in accordance with an act of the legislature, is ten cents on the hundred dollars; amount $315. I do also certify that the board of supervisors of this Marshall county have levied six hundred and seventy per cent. on the State tax for county purposes.

JOHN M. TURNER,
Clerk of the Board of Supervisors Marshall County, West Va.

Bond for injunction.

Know all men by these presents, that we, Joseph B. Ford, S. T. Armstrong, and W. H. Oldham, are held and firmly bound unto the board of supervisors of Marshall county and Jackson Reed, sheriff of said county, in the penal sum of fifteen thousand dollars; to the true payment whereof, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, jointly and severally, firmly by these presents, sealed with our seals, and dated December 15, 1864. The condition of the above obligation is such that whereas, an injunction has been granted to the Baltimore & Ohio Railroad Company, by Judge E. H. Caldwell, of the circuit court of said county, restraining the board of supervisors of said county, its agent or collector of taxes and county levies, and Jack- [page 14] son Reed, sheriff of said county, from proceeding to levy upon or distrain the property of the said Baltimore & Ohio Railroad Company, complainant in said injunction, against said board of supervisors and said Reed, for the amount of the taxes for State, school, and county purposes, assessed and charged against said complainant upon the tax-books of said county for the year 1864, or any part thereof, or otherwise, to collect the same until the further order of said circuit court: Now, if the said Baltimore & Ohio Railroad Company shall pay and satisfy all costs and damages which may be awarded against it, and shall prosecute the said injunction with effect, or in case the same shall be dissolved, shall pay the said taxes and county levies
24 with all such costs and damages as may be awarded said defendants, or either of them, by reason of the suing forth of said injunction, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] JOSEPH B. FORD.
[SEAL.] S. T. ARMSTRONG.
[SEAL.] W. H. OLDHAM.

[U. S. stamp.]

And at another day, to wit, at a circuit court held on the 6th day of April, 1865, at the court-house of said county, came the defendants, by their counsel, and filed their joint and several answers to the bill of complaint in this cause, and the said complainant replies thereto generally.

And thereupon the said supervisors of the county of Marshall and Jackson Reed, sheriff of the said county, [page 15] by leave of the court, file their cross-bill against the said Baltimore & Ohio Railroad Company, and John W. Garrett, president, and Joshua J. Atkinson, treasurer thereof, it is ordered that process of subpœna be issued thereon, returnable to the April rules of this court, and this last-named cause is sent to rules for proceedings therein.

Answers of supervisors to bill of injunction.

In chancery.—The joint and several answer of the defendants, the supervisors of the county of Marshall, and Jackson Reed, sheriff of the said county, to the bill of complaint of the Baltimore & Ohio Railroad Company, complainant:

These defendants, reserving to themselves all right of exception to the said bill, for answer thereto, say: They admit the complainant to be a corporation, and that it was made such by an act of the general assembly of Maryland, passed February 28th, 1827, entitled "An act to incorporate the Baltimore & Ohio Railroad Company." They suppose the copy of this act exhibited by the complainant to be correct; but inasmuch as the said act is fully set forth in the act of the general assembly of Virginia, passed March 8th, 1827, entitled "An act to confirm a law passed at the present session of the general assembly of Maryland, entitled 'An act to incorporate the Baltimore & Ohio Railroad Company,'" these defendants, for greater certainty, beg leave to refer to this act of the general assembly of Virginia, as found in the session acts for 1826–'7. [Pages 77 to 84 inclusive.]

They also admit, that it was provided by the 18th section
25. of the said act of the general assembly of Maryland, that the shares of the capital stock of the said company should be exempt from the imposition of any tax or burden by the States assenting to the said act. And that by the said act of the general assembly of Virginia, it was enacted that the [page 16] same rights and privileges should be, and were thereby, granted to the said company within the territory of Virginia, as were granted to it within the territory of Maryland. But they humbly insist, that although the shares of the capital stock of the said company, belonging to the stockholders thereof, would be exempt from taxation by the aforesaid provisions, so long as the said provisions were in force, yet the property belonging to the said company was not thereby exempted.

The defendants further say, that the said company was incorporated for the purpose of constructing a railroad from Baltimore, in the State of Maryland, to the Ohio river, in the State of Virginia; and that by the 22d section of the said act of the general assembly of Maryland, it was provided that if this road should not be commenced within two years from the passage of the said act, and be finished

within the State of Maryland in ten years from the time of the commencement thereof, then the said act should be null and void. And that by the said act of the general assembly of Virginia, it was enacted that the said company should be subject to the same pains, penalties, and obligations as were imposed by the said act of the general assembly of Maryland; and the same rights, privileges, and immunities which were reserved to the State of Maryland, or to the citizens thereof, were, by the said act of the general assembly of Virginia, reserved to the State of Virginia and her citizens.

These defendants are informed and believe that the said road was not finished, either in the State of Maryland or Virginia, within the time prescribed by the said acts; and that, by reason thereof, the said act of the general assembly [page 17] of Virginia long since expired and ceased to have any effect, and became and now is null and void, and no exemption from taxation can, therefore, be rightfully claimed by the said company by virtue thereof.

The defendants admit that the said company, having failed to finish the said road within the time contemplated by the original acts of incorporation, subsequent acts were passed by the general assembly of Virgina offering further time for the completion thereof, upon the terms and conditions in those acts specified; but they
26 deny that (except the act of March 6, 1847, hereinafter more particularly mentioned) the said company ever accepted either of the said acts, or complied with or performed the terms or conditions upon which such further time was offered. The exemption from taxation, which the shareholders of said company might otherwise have claimed under the said act of March 8, 1827, has, therefore, as these defendants believe and insist, never been in any manner revived or continued in force.

By the act passed by the general assembly of Virginia, March 6, 1847, entitled "An act to authorize the Baltimore and Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," section 7, it was enacted that the stock, property, and profits of said company, so far as the same might be or accrue within the commonwealth of Virginia, should be subject to general taxation in like manner and on the same footing with other similar companies within the said State; provided, however, that said [page 18] taxing power should not be exercised until and unless the net income of the said Baltimore & Ohio Railroad should exceed six per centum per annum upon their capital invested. It was also enacted by the 11th section of the said act, as a condition upon which the powers and privileges of the said act were granted, that the said company should accept the said act within six months, and enter upon the construction of the continuation of their road thereinbefore authorized within three years, and complete the same within twelve years after the passage of said act. And these defendants admit that, as the bill of complaint alleges, the said company did accept this act within the said six months, and have otherwise complied with the said condition, and are, therefore, now entitled to the privileges conferred by the said act.

But these defendants humbly insist that by the terms "general taxation" used in this seventh section, it was not intended to exclude taxation for county or municipal purposes; but that the true meaning and effect of the said section is, that the company should be subject to such taxation as might be common to itself and other like companies similarly situated, but not to special taxation imposed upon the said Baltimore & Ohio Railroad, its business or property, exclusively. It was to be subject to general taxation on the same footing with other similar companies, but not to special taxes applicable to itself alone.

If, however, the items "general taxation," as used in this section, should be deemed equivalent to "State taxation," these de-
27 fendants humbly insist, that until the said company [page 19] became entitled to the privileges conferred by the said act of March 6th, 1847, by accepting the said act and performing the conditions upon which the said privileges were granted, ts property, real and personal, within the State of Virginia, was subject to taxation, State, county, and municipal, like other property therein; and that by the said act, even if thus construed, it was in no wise exempted from county and municipal taxation, though it was provided that the power of State or "general taxation" should not be exercised in reference to said company, until the net income of its road should exceed six per cent. per annum upon the capital invested. In other words, these defendants humbly insist that the seventh section of the said act, if construed to mean that the stock, property, and profits of the said company, so far as the same might be or accrue within the commonwealth of Virginia, should be subject to State taxation in like manner, and upon the same footing with other similar companies within the said State; provided, however, that said power of State taxation should not be exercised until and unless the net income of the said Baltimore & Ohio Railroad should exceed six per centum per annum upon their capital invested; it would not operate as a restriction on the right of county or municipal taxation, but only on State taxation to which the said company would otherwise have been subject.

These defendants do also humbly insist, that, according to the true intent and effect of the said seventh section, the exemption from taxation thereby granted, continued [page 20] only until the net income of the said railroad exceeded six per cent. per annum on the capital invested; and if, at any time, it did exceed that amount, the said exemption then ceased and would not be revived, though the net income for subsequent years might be less than six per cent. per year.

These defendants are informed and believe that the net income of the said railroad has often, since the said act of March 6th, 1847, was in force, exceeded six per cent. per annum upon their capital invested. In particular, the defendants charge the truth to be, that in each of the years 1850, 1851, and 1852, the said company declared dividends of seven per cent. on their capital invested, out of the net income of the said road. That in May, 1856, they in like manner

declared a dividend of three per cent.; in October of the same year, another dividend of three per cent.; and in December of the same year, an extra dividend of thirty per cent. on the capital out of the
28 net income of the said road; on the first day of October, 1860, the said company, according to their own published reports, had on hand a surplus of $3,741,146 36 reserved out of the net income previously accrued, and over and above their capital invested and the dividends previously declared. During the year, commencing on that day, they declared two dividends of three per cent. each, and, after deducting the same from the net income of the year, they had on hand on the first day of October, 1861, a surplus of $4,312,977 43 over and above their capital; the net income of the road for the year exceeding, by the sum of $571,831 07, six per cent. on their capital invested.

The information of these defendants respecting the net income of the said road is, of course, very limited and imperfect, and they would by no means be understood as assert- [page 21] ing or believing that the net income has exceeded six per cent. per annum only in the instances above mentioned. They believe and charge the contrary to be the fact. They believe and charge, in particular, that the net income of the said road for the years 1863 and 1864 exceeded six per cent. per annum upon their capital invested. They are confirmed in this belief by the fact that in the bill of complaint in this cause, which has been sworn to by the president of the said railroad company, it is not alleged, in any shape or form, that the net income of the said road has not exceeded six per cent. per annum during the years above mentioned, or any other year.

These defendants humbly insist that the said railroad company, its officers and agents, who alone have the means of furnishing full information on the subject, should be required, by some convenient day, to be appointed by this honorable court, to produce, under oath, before the commissioner of this court, the necessary books, accounts, and papers to show the net income of the said road and its capital invested since the said act of March 6, 1847, was in force; and if they fail therein, that the said bill of complaint be dismissed.

In relation to the construction, which is insisted upon in the bill of complaint, that the taxing power reserved by the seventh section of the said act of March 6, 1847, was not to be exercised unless the net income derived from that [page 22] portion of the said road within the limits of Virginia should exceed six per centum per annum upon the capital invested within the said commonwealth, these defendants are advised, and humbly insist, that no such interpretation can reasonably be given to the said act. And they are also advised and humbly insist, that the provision of the act of March 11, 1837,
29 passed by the general assembly of Virginia, entitled "An act prescribing certain general regulations for the incorporation of railroad companies," that all machines, wagons, vehicles, or carriages belonging to any company incorporated subject to the provisions of the said act, together with all their works, and all profits which should accrue from the same, should be vested in the respective shareholders forever, in proportion to their respective shares,

meant nothing more than that such property, like all corporate property, should belong to and be held and used by the corporation in trust for the respective shareholders, in proportion to their several shares. At all events, it does not mean that every such article of property, for the purpose of taxation, should be divided among and assessed to seven or eight hundred different proprietors in various proportions.

The said complainant also insists that, upon the true construction of the aforesaid seventh section, the taxing power therein reserved was not intended to be exercised until the legislature had, by some proper proceeding, ascertained and declared that the profits of the said company had reached the point at which it became liable to taxation; but these defendants humbly submit that there is nothing to justify such an interpretation of that section.

By the constitution of the State, the legislative and judicial departments of the government are separate [page 23] and distinct, and neither can exercise the powers properly belonging to the other. If the Baltimore & Ohio Railroad Company insist that, by virtue of the said acts of March 8, 1827, and March 6, 1847, or any other law, its property in this State is not liable to taxation, the question thus raised is a judicial one, dependent as it is upon the interpretation of the law, and its application to facts to be ascertained from the pleadings and the evidence. It could not, therefore, be adjudged by the legislature, nor would the said railroad company be concluded or bound by any declaration of the legislature respecting it. These defendants humbly insist that the intention of the legislature to have the property of all railroad companies listed and assessed for taxation, except such as might be exempt from taxation by the charter, will be apparent upon reference to the 52d, 53d, and 54th sections of the act passed December 3d, 1863, entitled "An act to provide for the assessment of taxes," as well as by other legislation of this State. If the officers of any railroad company fail to make a proper return of its property for taxation, it is the duty of the respective assessors of each of the counties through which the said railroad passes to ascertain the valuation of its property within his county, and enter the same for taxation upon his proper books, and this duty the assessor must perform at his own peril.

These defendants admit that the property of the complainant in the first and upper assessment district of the said county of Marshall has been assessed for taxation at the valuation of $315,000, and is so entered on the proper books, and that said complainant stands charged with the following taxes thereon for the year 1864, viz:

State tax, thirty cents per hundred dollars	$945 00
State tax for the support of free schools, ten cents per hundred dollars	315 00
County levy, two dollars and one cent per hundred dollars on the valuation, or 670 per cent. on the State tax of $945	6,331 50
Making in all	$7,591 50

But these defendants humbly insist that the said assessment was lawfully and properly made by the assessor [page 24] in performance of the duty imposed upon him by the acts of the legislature of West Virginia; that the complainant is nowise exempt by law from any part of the said taxes, and that the same ought to be collected and paid.

And having this amendment, these defendants pray that the injunction granted in the cause be dissolved, and that they be hence dismissed with reasonable costs.

LAMB & PAULL, *P. D.*

Given under the common seal of the said supervisors of the county of Marshall, this 22d day of March, 1865.

[L. S.] W. H. H. SHOWACRE,
Pres't Board of Super.

WASHINGTON TOWNSHIP, *ss:*

Before the subscriber, a justice for Washington township in the county of Marshall, this day, in my said township, came Jackson Reed, and made solemn affirmation that the matters set forth in the
31 foregoing answer in chancery, so far as they are stated of his own knowledge are true, and so far as they are on information derived from others, he believes them to be true.

Given under my hand this 13th day of March, 1865.

WM. BLAKE, *J. P.*

Cross-bill.

To the Hon. E. H. Caldwell, judge of the circuit court of Marshall county:

Humbly complaining, show unto your honor, your orators, the supervisors of the county of Marshall and Jackson Reed, sheriff of the said county:

The Baltimore & Ohio Railroad passes through the first and upper assessment district of the county of Marshall, and the officers of the Baltimore & Ohio Railroad Com- [page 25] pany (which company is a corporation, owning the said railroad, and the real and personal property pertaining thereto, or used in or about the business of the same,) in the year 1864, having wholly failed and refused to make the return required by the 52d section of the act of the legislature of this State, passed December 3d, 1863, entitled "An act to provide for the assessment of taxes," the assessor for the said district proceeded to ascertain the valuation of the property of said company within his district in the manner prescribed by law, and to assess thereon and charge to the said company the taxes with which said company was properly chargeable in respect to the said property.

The valuation so ascertained, being $315,000, the said company now stands charged on the proper books of the said assessment district with the following taxes for the year 1864, viz:

State tax for general purposes, thirty cents per hundred dollars	$945 00
State tax for the support of free schools, ten cents per hundred dollars	315 00
County levy, two dollars and one cent per hundred dollars on the said valuation, or 670 per cent. on the State tax of $945	6,331 50
Making in all	$7,591 50

Whereupon it became the duty of your orator, Jackson
32 Reed, (he being sheriff of the county of Marshall,) to collect and account for the said taxes according to law, and he accordingly proceeded to demand, and did demand, payment thereof of the said company.

But the said company thereupon filed its bill of complaint in this court against your orators, claiming that, by virtue of certain acts of the general assembly of Virginia, [page 26] (particularly an act passed March 8th, 1827, entitled "An act to confirm a law, passed at the present session of the general assembly of Maryland," entitled "An act to incorporate the Baltimore & Ohio Railroad Company," and an act passed March 6th, 1847, entitled "An act to authorize the Baltimore & Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia,") the said company is exempts within this State, from the payment of taxes whether State, school, county, or other. And such proceedings were had on the said bill of complaint, that your orators now stand enjoined and restrained by the order of this honorable court from proceeding to levy upon or distrain the property of the said campany, for the said taxes assessed and charged against the company upon the tax-books of the county of Marshall for the year 1864, or any part thereof, or otherwise to collect the same, until the further order of this honorable court.

Your orators further show unto your honor, that they have filed in this honorable court, their joint and several answer to the said bill of complaint, claiming that the said company is in no wise exempt by law from any part of the said taxes, and that the same ought to be collected and paid; and that for the purpose of enabling your orator, Jackson Reed, to collect the same, the said injunction ought to be dissolved.

Your orators here beg leave to refer to the said bill and answer, and to the orders and proceedings in the said cause, and that the same may be taken as part of this bill [page 27] of complaint, as if here inserted, word for word.

And your orators, referring to the said bill, answer, and proceedings, further show to your honor, that it is material in the said cause to ascertain and show what has been the net income of the said Baltimore & Ohio railroad for the year 1856, and each subsequent year; and what has been their capital invested during each of the said years; that the said railroad company, its officers and agents, and

particularly the president and secretary hereinafter named, of the said company, have in their possession, and under their control, the books, papers, and accounts necessary to furnish full and correct information upon these points. And that your orators are advised they cannot safely proceed in their defence against the said bill of complaint of the said company, without the production of the said books, papers, and accounts, and a discovery in respect to said matters from John W. Garrett, who is the president, and Joshua I. Atkinson, who is secretary of the said railroad company; the said railroad company itself being a corporation, incapable of answering under oath.

33

In tender consideration whereof, and forasmuch as your orators can only have adequate relief in the premises in a court of equity, and to the end that the said railroad company, and its said president and secretary, may be required to produce, as this honorable court may order, all books, papers, and accounts in their possession, or under this control, necessary to ascertain and show what has been the net income of the [page 28] said railroad company, and what its capital invested during the year 1856, and each subsequent year; and that the said railroad company, under its common seal, and its said president and secretary, under their several oaths or solemn affirmations, may make a full and true discovery of all and every the matters aforesaid. And that your orators may have such further relief in the premises as to this honorable court may seem equitable. May it please your honor to grant to your orators one or more writs of subpœna, to be directed to the said Baltimore & Ohio Railroad Company, John W. Garrett, and Joshua I. Atkinson, commanding them, &c. And your orators will ever pray, &c.

LAMB & PAULL,
For Comp't.

And at another day, to wit, at a circuit court continued and held in and for the county of Marshall, at the court-house of said county, on the 10th day of April, 1865, the complainant, by its counsel, offered an amended bill to its bill of injunction heretofore filed in this cause, and asked leave of the court to file said amended bill; which motion is continued until the next term of this court.

And at another day, to wit, at a circuit court holden in and for the county of Marshall, at the court-house, on the 8th day of June, 1865, came the parties in the above cause, by their counsel, and on motion of the complainant, in the first-named cause, leave is given it to file the amended bill tendered at the last term of the court, and the same is accordingly here filed in court, and the counsel for the defendants in said first-named cause, waive the issue of process thereon. The said defendants in the cause secondly above named, by their counsel, here filed in court a demurrer to the bill in said cause; also, their answer to the said bill, and leave is given the complainant to consider the same.

34

Amended bill.

To the Hon. Elbert H. Caldwell, judge of the circuit court of Marshall county:

The Baltimore & Ohio Railroad Company, by way of amendment to their original bill of injunction heretofore filed in this honorable court, beg leave, in reference to the said seventh section of the act of March 6, 1847, therein referred to, to show and charge that the net income of said company, within the State of Virginia, and, since its creation, within the State of West Virginia, has not, prior to the first day of February, eighteen hundred and sixty-four, exceeded the rate of six per centum per annum upon their capital invested within said State, and that, therefore, upon the very terms of said section by which, and by which alone, the exemption from taxation, secured to the company by their original charter, has been modified, the liability to taxation, contemplated by said 7th section, has not yet accrued, nor can taxes for any purpose be as yet demanded of said company consistently with the rights secured to them by the different acts of the State of Virginia constituting their charter.

This complainant prays that the allegations of this amended bill may be taken and received as part and parcel of [page 30] said original bill, and that it may have all the relief to which it would have been entitled if the same had been originally therein contained, together with all general relief, &c., &c.

BALTIMORE & OHIO RAILROAD COMPANY,
By Counsel.

DESPARD.
OLDHAM, *P. Q.*

STATE OF MARYLAND, *City of Baltimore, to wit:*

Before the undersigned, a justice of the peace of the State of Maryland in and for the city of Baltimore, duly authorized to ad-
35 minister an oath, personally appeared John King, jr., auditor of the Baltimore & Ohio Railroad Company, and made oath that the matters and facts stated in the foregoing amended bill are true to the best of his knowledge and belief.

Given under my hand this 5th day of April, 1865.

[SEAL.] JNO. SHOWACRE, *J. P.*

[U. S. stamp.]

I, Alford Mace, clerk of the superior court of Baltimore city, the same being a court of record of the State of Maryland, do certify that the signature of John Showacre, the justice of the peace before whom the foregoing affidavit was made, is genuine, and that the said John Showacre had authority to administer said oath.

Witness my hand and the official seal of said superior court of Baltimore city, in the State of Maryland, this fifth day of April, in the year 1865.

[SEAL.] ALFORD MACE, *Clerk.*

[U. S. stamp.]

Demurrer to bill of discovery.

The Baltimore & Ohio Railroad Company, John W. Garrett and Joshua I. Atkinson, to the bill of complaintof the supervisors of the county of Marshall, and Jackson [page 31] Reed, sheriff of the said county:

These defendants, by protestation, not confessing or acknowledging all, or any, of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur in law to the said bill, and for cause of demurrer show that it appears by the bill of complaint of the said Baltimore & Ohio Railroad Company, filed in this court, against the said supervisors of the county of Marshall, and Jackson Reed, sheriff of the said county, and by the answer of the said defendants thereto, which said bill and answer are made a part of the bill of complaint hereinbefore first referred to; that the
36 said Baltimore & Ohio Railroad Company was made, by the sixth section of the act passed on the sixth day of March, eighteen hundred and forty-seven, entitled "An act to authorize the Baltimore & Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," subject to the provisions of the act of assembly, passed on the eleventh day of March, eighteen hundred and thirty-seven, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road, or other im- [page 32] provements, then or thereafter constructed within the State of Virginia, so far as the same are properly applicable, and that by the twenty-third section of the act passed March the eleventh, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, all machines, wagons, vehicles, or carrirges belonging to any company, incorporated subject to the provisions of this act, together with all their works, and all profits which should accrue from the same, should be vested in the respective shareholders forever in proportion to their respective shares, and should be deemed personal estate; and that it appears from the said acts of assembly that the officers of the said Baltimore & Ohio Railroad Company were not bound to list for taxation the property, money, and credits of said company, or to perform any of the other acts and duties required by officers of railroad companies by the fifty-second section of the act of the legislature of this State, passed on the third day of December, eighteen hundred and sixty-three, entitled "An act to provide for the assessment of taxes," wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said bill, and to all the matters and things contained therein, and pray the judgment of this honorable court, whether they shall be [page 33] compelled to make any further or other answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

OLDHAM,
DESPARD,
LEE,
For Defendants.

Answer of B. & O. R. R. Company.

To the Hon E. H. Caldwell, judge of the circuit court of Marshall county:

The joint and several answer of the Baltimore & Ohio Rail-
37 road Company, John W. Garrett and Joshua I. Atkinson, defendants, to the bill of complaint of the supervisors of the county of Marshall, and Jackson Reed, sheriff of the said county:

These defendants, now and at all times hereafter saving and reserving unto themselves, and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is, or are, material or necessary for them to make answer unto.

These defendants, answering, say that they admit that the Baltimore & Ohio Railroad Company has heretofore filed in your honorable court its bill of complaint against the said supervisors of Marshall county, and Jackson Reed, sheriff of said county, as alleged in said bill of complaint, so filed as aforesaid by the said Baltimore & Ohio railroad, may be taken as a part of this their answer.

And these defendants, further answering, say that the said John W. Garrett has been president of the said Baltimore & Ohio Railroad Company since the year eighteen hundred and fifty-eight, and that the said Joshua I. Atkinson has been secretary of the said company since the year eighteen hundred and thirty-five; that the books and accounts of the said company are not in the charge of the said John W. Garrett, nor wholly in the charge of the said Joshua I. Atkinson, who has his separate and distinct department in relation to the accounts of the said company. But the said Baltimore & Ohio Railroad Company and the said John W. Garrett and the said Joshua I. Atkinson say that they have caused statements to be prepared by the officers of the Baltimore & Ohio Railroad Company, properly in charge of the books and vouchers on which said statements are founded, of the capital invested by the [page 34] said Baltimore & Ohio Railroad Company, and of the net income of the said company in each year from the thirtieth day of September, eighteen hundred and fifty-five, to the thirtieth day of September, eighteen hundred and sixty-two, the said thirtieth day of September being the termination of the fiscal year of the said company. And that they believe such statements to be true, and do therefore set forth the same as a part of their answer, as follows: That is to say, these respondents
say that the invested capital of the said company in the fis-
38 cal year ending on the thirtieth day of September, eighteen hundred and fifty-six, was $27,635,717 97, (twenty-seven millions six hundred and thirty-five thousand seven hundred and seventeen dollars and ninety-seven cents,) and the net income of the said company in the year last aforesaid was $2,031,658 71, (two million and thirty-one thousand six hundred and fifty-eight dollars and

seventy-one cents;) that the invested capital of the said company in the fiscal [page 35] year ending on the thirtieth day of September, eighteen hundred and fifty-seven, was $29,783,187 90, (twenty-nine millions seven hundred and eighty-three thousand one hundred and eighty-seven dollars and ninety cents,) and the net income of the said company in the year last aforesaid was $1,889,955 75, (one million eight hundred and eighty-nine thousand nine hundred and fifty-five dollars and seventy-five cents;) that the invested capital of the said company in the fiscal year ending on the thirtieth day of September, eighteen hundred and fifty-eight, was $30,482,261 47, (thirty million four hundred and eighty-two thousand two hundred and sixty-one dollars and forty-seven cents,) and the net income of the said company in the year last aforesaid was $1,330,536 22, (one million three hundred and thirty thousand five hundred and thirty-six dollars and twenty-two cents;) that the invested capital of the said company in the fiscal year ending on the thirtieth day of September, eighteen hundred and fifty-nine, was $31,183,780 41, (thirty-one million one hundred and eighty-three thousand seven hundred and eighty dollars and forty-one cents,) and the net income of the said company in the year last aforesaid was $1,987,019 55, (one million nine hundred and eighty-seven thousand nineteen dollars and fifty-five cents;) that the invested capital of the said company in the fiscal year ending on the thirtieth day of September, eighteen hundred and sixty, was $31,721,495 50, (thirty-one millions seven hundred and twenty-one thousand four hundred and ninety-five dollars and fifty cents,) and the net income of the said company [page 36] in the year last aforesaid was $2,362,841 35, (two millions three hundred and sixty-two thousand eight hundred and forty-one dollars and thirty-five cents;) that the invested capital of the said company in the fiscal year ending on the thirtieth day of September, eighteen hundred and sixty-one, was $32,126,975 09, (thirty-two millions one hundred and twenty-six thousand nine hundred and seventy-five dollars and nine cents,) and the net income of the said company in the year last aforesaid was $1,886,302 01, (one million eight hundred and eighty-six thousand three hundred and two dollars and one cent;) that the invested capital of the said company in the fiscal
39 year ending on the thirtieth day of September, eighteen hundred and sixty-two, was $32,650,643 17, (thirty-two millions six hundred and fifty thousand six hundred and forty-three dollars and seventeen cents,) and the net income of the said company in the year last aforesaid was $3,159,416 64, (three millions one hundred and fifty-nine thousand four hundred and sixteen dollars and sixty-four cents;) that they are not able to procure and set forth, as a part of this their answer to the said bill of discovery, a statement of the capital invested by the said Baltimore & Ohio Railroad Company, and of the net income of the said company in the year ending on the thirtieth day of Sep- [page 37] tember, eighteen hundred and sixty-three, nor are they able to set forth, as a part of this their answer to the said bill, a statement of the capital invested by the said company, and of the net income of the said company, in the year ending September thirtieth, eighteen hundred and sixty-four.

That because of the destruction and loss of the property of the said company in the said years—by reason of the war and rebellion then in progress—and not wholly ascertained, and because, also, of the large business done by the said company for and on behalf of the government of the United States during the years aforesaid, which accounts are yet, to a very large extent, unadjusted, the said defendants have not been, and are not yet, able to set forth any accounts which will show the net income of the said company on its capital invested during the said last-mentioned years.

And the said defendants, further answering, say that the amounts hereinbefore set forth as capital invested by the said company in the years for which the same is set forth, embrace all the capital invested in the said years respectively, wherever the same was then situated; that is to say, the capital invested in the State of Virginia, under the authority conferred on the Baltimore & Ohio Railroad Company by the laws of that State, before the erection of West Virginia into a State; in the State of Maryland, under the authority conferred on the Baltimore & Ohio Railroad Company by the laws of the said State; in the District of Columbia and elsewhere; and after the erection of West Virginia into a State, they embrace the capital invested by said company in the State of Maryland, under the [page 38] authority conferred on the Baltimore & Ohio Railroad Company by the laws of that State; in the District of Columbia; in the State of West Virginia, under the authority conferred on that company by the laws of the State of Virginia in force in that State, and elsewhere.

40 And these defendants, further answering, say that although the greater part of their line of roads lay formerly within the State of Virginia, and now lies within the State of West Virginia, yet that by far the greater part of the revenue of said company (authorized as aforesaid by the laws of Maryland and Virginia, now the law of West Virginia) is earned within the State of Maryland and in the District of Columbia, and wholly beyond the limits of the State of West Virginia, or any county thereof.

And these defendants, further answering, say that the extra dividend of thirty per cent. declared on the stock of the Baltimore & Ohio Railroad Company, on the seventeenth day of December, eighteen hundred and fifty-six, was not so declared because the net income of the said Baltimore & Ohio Railroad Company, in the years aforesaid, equalled the said [page 39] sum, but the same was declared because the net earnings of the said company had been from the year eighteen hundred and thirty, in whole or in part applied in each of said years, and up to time of the declaring of the dividend aforesaid by the said company, to the invested capital thereof, by using the same in the construction of the said road, with the intention, in conformity with the practice of the company, of paying the same to the stockholders at such time as it might be deemed judicious so to do. That the said dividend, so-called, represented really monies borrowed from the stockholders of the said company, and added to the capital thereof during the long series of years during which the same had been withheld from the said stockholders, and appropriated by the said com-

pany, to the purpose of construction, with the intention to make repayment as aforesaid, and for which the stockholders were reimbursed in the said form of payment. That the so-called dividend was not a dividend upon the capital invested by the said company, but was a reimbursement to the stockholders (in proportion to the amount of the capital stock held by them) of that amount, which had been added by the said company to the invested capital of the said company, under an agreement on the part of the said company, to return the same to the stockholders in some proper form thereafter.

And the said defendants, further answering the allegations forming a part of the said bill of discovery, say that they admit that the said company declared dividends of seven per cent. in the years eighteen hundred and fifty, eighteen hun- [page 40] dred and fifty-one, and eighteen hundred and fifty-two; but they say that
41 the said dividends were not dividends upon the capital invested in said company, but were, on the other hand, dividends upon the capital stock of the said company, and that the said dividends in the said years were not equal to six per cent. upon the capital invested of the said company.

And the said defendants, further answering the allegations made a part of the said bill of discovery, say that the published reports of the said company do not show on the first day of October, eighteen hundred and sixty, the said company had on hand a surplus of three million seven hundred and forty-one thousand one hundred and forty-six dollars and thirty-six cents, reserved out of the net income previously accrued, and over and above their capital invested, and the dividends previously declared; but that the surplus stated in said profit and loss accounts represents items, also, forming in such year a part of the capital invested of the said company.

And these defendants say, in further answer to the allegations made a part of said bill of discovery, that the published reports of said company do not show that on the first day of October, eighteen hundred and sixty-one, the said company had on hand a surplus of four million three hundred and twelve thousand nine hundred and seventy-seven dollars and forty-three cents, reserved out of the net income previously [page 41] accrued, and over and above their capital invested, but that the surplus stated in said profit and loss account represents items, also, forming in such years a part of the invested capital of the said company.

But these defendants, further answering, say that although the net income of the Baltimore & Ohio Railroad Company, derived under and by virtue of the laws of Maryland and Virginia aforesaid, may in any one or more of the years from the year eight hundred and fifty-six to the year eighteen hundred and sixty-four, both inclusive, have exceeded six per centum per annum upon its capital invested, under and by virtue of the laws of Maryland and Virginia aforesaid, yet that the president, secretary, or principal accounting officer of the said Baltimore & Ohio Railroad Company was not bound for that reason to make the return required by the 52d section of the act of the legislature of this State, passed on the third day of December, eigh

teen hundred and sixty-three, entitled "An act to provide for the assessment of taxes." For these defendants say that it is expressly provided in the said 52d section of the law of West Virginia last aforesaid, that the property exempt from taxation by the char-
42 ter of any railroad company shall not be liable to assessment; and these defendants say that under and by virtue of the seventh section of the act of the general assembly of Virginia, passed on the sixth day of March, eighteen hundred and forty-seven, entitled "An act to authorize the [page 42] Baltimore & Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," (said act being a part of the Virginia charter of the said company,) the said Baltimore & Ohio Railroad Company, until the first day of February, eighteen hundred and sixty-four, and during the years previous thereto, was exempt from taxation because these defendants say that the net income of the Baltimore & Ohio Railroad Company upon its capital invested in the State of Virginia, never did, in any year prior to the erection of West Virginia into a State, exceed six per centum per annum; and because these defendants say that the net income of the Baltimore & Ohio Railroad Company upon its capital invested in the State of West Virginia, never did in any year between the periods of the erection of West Virginia into a State, and the said first day of February, 1864, exceed six per centum per annum; and especially that the net income of the Baltimore & Ohio Railroad Company upon its capital invested in the State of West Virginia, did not in the year preceding the said first day of February, eighteen hundred and sixty-four, exceed six per centum per annum; and these defendants say that the exemption from taxation in the State of Virginia and in the State of West Virginia, in the years aforesaid, and especially in the year ending first of February, eighteen hundred and sixty-four, was therefore a vested right in the said Baltimore & Ohio Railroad Company, secured to the said company by the Constitution of the United States; [page 43] and that, therefore, the president, secretary, or principal accounting officer of the said company was not bound to make the return required by the 52d section of the act of December third, eighteen hundred and sixty-three aforesaid; and that the assessor for the first or upper district of the county of Marshall was not authorized under the said act of the legislature of West Virginia, passed December third, eighteen hundred and sixty-three, and entitled as aforesaid, to make valuation of the property of the said company, or to assess and charge taxes thereon to the said company, and the said supervisors of Marshall county, and the Sheriff of said county have, for the reason aforesaid, no authority in the premises.

And the said defendants pray to be hence dismissed with
43 their reasonable costs and charges in this behalf wrongfully sustained.

J. W. GARRETT.
President of the Baltimore & Ohio Railroad Company.

OLDHAM,
DESPARD,
LEE, *P. D.*

STATE OF MARYLAND, *Baltimore City, to wit:*

On this thirty-first day of May, in the year eighteen hundred and sixty-five, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, [page 44] personally appeared the above-named John W. Garrett and Joshua I. Atkinson, and severally made oath that the matters stated in the foregoing answer are true to the best of their knowledge and belief.

JOHN SHOWAKER.

[U. S. stamp.]

STATE OF MARYLAND, *Baltimore City, to wit:*

I hereby certify, that I am the clerk of the superior court of Baltimore city, the same being a court of record of the State of Maryland aforesaid, and I do further certify that the signature of John Showaker, before whom the foregoing affidavits were taken, is genuine, and that he had at the time of taking said affidavits authority to administer the same.

Witness my hand and the seal of the said court affixed hereto this thirty-first day of May, A. D. 1865.

[L. S.] ALFORD MACE, *Clerk.*

[U. S. stamp.]

And at another day to wit, at a circuit court continued and held for the said county of Marshall, at the court-house, on the 13th day of June, 1865, on motion of the defendants leave is granted them to file their answer to their amended bill in this case, which is granted, and the answer is accordingly herewith filed.

44 *Answer to amended bill.*

In chancery.—The joint and several answer of the defendants, the supervisors of the county of Marshall, and Jackson Reed, sheriff of the said county, to the amendment [page 45] filed in this honorable court by the Baltimore & Ohio Railroad Company, to their original bill against these defendants.

These defendants, reserving to themselves all right of exception to the said amendment, and repeating and insisting upon all and singular the allegations and denials contained in their answer heretofore filed to the said original bill, for answer to the said amendment, say, they are not, nor is either of them informed, whether the net income of the said railroad company within the State of Virginia, or within the State of West Virginia, since the creation of the last-mentioned State, has or has not, at any time or for any period prior to the first day of February, eighteen hundred and sixty-four, exceeded the rate of six per cent. per annum upon the capital invested by said railroad company within the said State; nor have these defendants, or either of them, any belief upon the subject; wherefore, these defendants cannot, and do not, admit the allegation in that respect, contained in the said amendment.

And these defendants again here insist that neither by the second section of the act of March 6th, 1847, referred to in the original bill and answer, nor by any other law of the State of Virginia, or West Virginia, is the said railroad company, or its property in the State of Virginia, or West Virginia, exempted from State, county, or school taxes, unless the net [page 46] income derived from that portion of the said road within the State of Virginia, or West Virginia, should exceed six per cent. per annum upon the capital of the said railroad company invested within the said State; nor has the said railroad company, or its property as aforesaid, ever been so exempted.

Having thus answered, these defendants again pray, &c.

LAMB & PAULL, *For Def'ts.*

Given under the common seal of the said supervisors of the county of Marshall, this 13th day of June, 1865.

SAMUEL RIGGS,
[L. S.] *Pres. Board Sup'rs.*
JACKSON REED, *S. M. C.*

45 WEST VIRGINIA, *Marshall County, ss:*

Before the subscriber, a notary public for the county of Marshall, this day, in my said county, came Jackson Reed, and made solemn affirmation that the matters set forth in the foregoing answer in chancery, so far as they are stated of his own knowledge, are true, and so far as they are stated on the information of others, he believes them to be true.

Given under my hand this 13th day of June, 1865.

HOUSAN RIGGS, *Notary Public.*

And at another day, to wit, at a circuit court holden in and for the county of Marshall, at the court-house, on the 7th day of November, 1865, the following orders were made in the two causes:

First. This day came the parties, by their counsel, and the plaintiff's join in the demurrer heretofore filed by the defendants to the bill in this cause, and reply generally to the answer of said defendants, and this cause is continued to the next term.

Second order. This day came the parties, by their counsel, and thereupon the plaintiff replies generally to the answer of said defendants heretofore filed to the amended bill [page 47] in this cause, and this cause is continued to the next term.

And at another day, to wit, at a circuit court holden in and for the county of Marshall, at the court-house, on the 6th day of November, 1866, the defendants, by their attorney, moved the court to dissolve the injunction in this cause, which motion is docketed and continued to a future day of the term.

THE BALTIMORE & OHIO RAILROAD COMPANY *vs.* JACKSON REED, SHERIFF OF MARSHALL county, and the supervisors of Marshall county.	In chancery in the circuit court of Marshall co.

The plaintiff in the above cause will please take notice that on Tuesday, the 6th day of November next, or as soon thereafter as the

motion can be heard, during the next term of the circuit court of Marshall county, we will move the said court to dissolve the injunction heretofore granted in said cause.

LAMB & PAULL,
Counsel for Defendants.

WHEELING, *Oct. 22d*, 1866.

46 Service accepted this Oct. 22d, 1866.

B. & O. R. R. CO.,
Per JOHN G. CHANDLER,
As't Counsel.

And at another day, to wit, at a circuit court holden in and for the said county of Marshall, at the court-house of said county, on the day and year first aforesaid, to wit, [page 4] on the 9th day of April, 1867, this cause came on this 9th day of April, 1867, to be heard on the original and amended bill and exhibits; the answer of the said supervisors and sheriff to the original bill; the answer of the same to the amended bill; the replications to those answers; the bill of discovery filed by the said supervisors and sheriff; the demurrer thereto and the joinder therein; the answer thereto; the replication to the last-mentioned answer; the subpœnas in the two cases and returns thereon; the former orders in said cases; the depositions of John King, junior, and Joshua I. Atkinson; and the exhibits and statements annexed thereto; the agreement in writing of the parties, by their counsel, filed on the 7th day of November, 1866; and the papers written and printed, therein mentioned; the preamble and resolution adopted on the 17th day of December, 1856, by the board of directors of the said Baltimore & Ohio Railroad Company; the entry on the personal property book of said Marshall county, of the assessment made against said railroad company; and the several acts of the legislature of Viriginia, concerning the said railroad company; and was argued by counsel; on consideration whereof, the court being of opinion that the said railroad company is not entitled to the exemption claimed by it, either in relation to State or county taxation, doth adjudge, order, and decree that the injunction heretofore awarded in this cause be dissolved, and the said original and amended bills of said railroad company be dismissed, and that the said supervisors and sheriff, defendants, recover against the said railroad company their costs by them in this cause expended.

Agreement.

The following are the agreements between the parties by their counsel, and depositions of witnesses, and other writings filed in the cause and signed by the parties, viz:

47 In chancery in the circuit court for Marshall county, the State of West Virginia.

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
THE SUPERVISORS OF MARSHALL COUNTY, and Jackson Reed, sheriff of said county, defendants.

It is agreed by the parties that on the trial or hearing of the above cause, and of any motion or question therein, whether in the circuit court or an appelate court, either [page 49] party may produce and read any portions of the printed annual reports of the president and directors to the stockholders of the Baltimore & Ohio Railroad Company, to have like effect as if the same were proved in the cause; and either party may have any portions of such reports copied and made part of the record of the cause, to have like effect as aforesaid, or may read the same as such from the printed reports, with like effect as aforesaid.

It is further agreed that the resolutions of the 1st of December, 1856, declaring the extra dividend of 30 per cent., was preceded by preamble explanatory of the same, and that the said preamble and resolution are in the words and figures following: (Here insert the preamble and resolution found at page 12 and 13 of printed pamphlet containing case of mayor and city council of Baltimore against Baltimore & Ohio Railroad Company;) and that the same may be read as evidence in this cause to have the same effect as if proven.

It is further agreed that the total revenue of the Baltimore & Ohio Railroad Company, expenses, interest, dividends paid, and dividends received, and the net profits used on [page 50] construction during the twenty-six years ending 30th September, 1856, were as represented in the table following, to wit: (Here insert the table found at p. 59 of the pamphlet above referred to.)

It is further agreed that the report of the special committee of five of the directors of the Baltimore & Ohio Railroad committee, dated the 1st December, 1856, upon the proposition to return the balance of the net earnings from the main stem of said road, may be read upon the hearing of the cause and have the same effect as if proved in this cause, and that said report is in the words and figures following, to wit: (Here insert the report found beginning on page 56 of the printed pamphlet above mentioned.)

It is further agreed that copies of any orders or resolutions of the board of directors of the Baltimore & Ohio Railroad Company in relation to dividends declared by said board out of the earn-
48 ings of said — may be read — evidence upon the hearing of this cause, or of any motion made or to be made therein, to have the same legal effect as if proven in the cause.

LAMB & PAULL,
Counsel for Defendants.
LEE,
Solicitor for Complainant.

It is also agreed that the bill may be amended [page 51] by the complainant by inserting therein the words, "In violation of the vested right of this complainant under the several acts aforesaid constituting its charter, and in contravention of the Constitution of the United States."

LEE, *For Complainant.*
LAMB & PAULL,
For Defendants.

Filed Nov. 7, 1866.

H. RIGGS, *Clerk.*

Dividends declared by the Baltimore & Ohio Railroad Company upon its capital stock on and since May 15, 1856:

Three per cent. declared May 15, 1856, on $10,105,600 capital stock; amount of dividend, $303,168.

Three per cent. declared Oct .8, 1856, on $10,108,800 capital stock; amount of dividend, $303,264.

Three per cent. declared Dec. 17, 1856, on $10,110,200 capital stock; amount of dividend, $3,033,060.

Three per cent. declared May 26, 1857, on $10,110,500 capital stock; amount of dividend, $303,315.

Three per cent. declared May 18, 1859, on $10,111,600 capital stock; amount of dividend, $303,348.

Three per cent. declared Nov. 9, 1859, on $10,111,600 capital stock; amount of dividend, $303,348.

Three per cent. declared April 13, 1860, on $10,112,700 capital stock; amount of dividend, $303,381.

Three per cent. declared Oct. 27, 1860, on $10,112,900 capital stock; amount of dividend, $303,387.

Three per cent. declared April 16, 1861, on $10,113,200 capital stock; amount of dividend, $303,396.

Three per cent. declared May 28, 1862, on $10,113,300 capital stock; amount of dividend, $303,399.

Three per cent. declared Sept. 30, 1862, on $13,037,700 capital stock; amount of dividend; $391,131.

Three per cent. declared March 13, 1863, on $13,111,525 capital stock; amount of dividend, $393,345,75.

49 Three per cent. declared Oct. 26, 1863, on $13,117,500 capital stock; amount of dividend, $393,525 00.

Three per cent. declared Oct. 26, 1863, on $13,117,500 capital stock; amount of dividend, $393,525 00. (Extra.)

Four per cent. declared April 13, 1864, on $13,122,600 capital stock; amount of dividend, $524,904 00.

Four per cent. declared Nov. 1, 1864, on $13,124,400 capital stock; amount of dividend, $524,976 00.

Four per cent. declared May 22, 1865, on $13,125,600 capital stock; amount of dividend, $525,024 00.

Four per cent. declared Oct. 23, 1865, on $13,132,100 capital stock; amount of dividend, $525,284 00.

Four per cent. declared April 30, 1866, on $13,133,500 capital stock; amount of dividend, $525,340 00.

Four per cent. declared Oct. 23, 1866, on $13,133,700 capital stock; amount of dividend, $525,348 00.

In chancery in the circuit court of Marshall county, West Va.

BALTIMORE & OHIO RAILROAD CO.
vs.
SUPERVISORS OF MARSHALL CO., and
Jackson Reed, sheriff.

The parties agree that the above is a correct statement of the rate and amount of all of the several dividends [page 52] declared by the Baltimore & Ohio Railroad Company, since the beginning of the year 1856.

LAMB & PAULL,
Counsel for Def'ts.
LEE, *Solicitor for*
B. & O. R. R. Co.

Nov. 2, 1866.

Preamble and resolution.

At an adjourned meeting of the board of directors of the Baltimore & Ohio Railroad Company, held on Wednesday, December 17, 1856, were present the president and all the directors except one. The following preamble and resolution were adopted, viz:

Whereas there has been appointed by the Baltimore & Ohio Railroad Company, from time to time, the sum of three millions of dollars and upwards of the net earnings of the main stem of the road, to the purpose of constructing, with the intention, in conformity with the practice of the company, of paying the same to the stockholders in the shape of a dividend, at such time as they might deem judicious.

Therefore, be it—

50 Resolved, That an extra dividend of thirty per cent. be declared on the stock of the company, to be paid on or after the 12th day of January next, to all stockholders owning stock on the 22nd day of December, 1856, in certificates of indebtedness, bearing an interest from the first day of June, 1857, of six per cent. per annum, payable half-yearly on the [page 53] first day of December and June in each year, until the first day of June, 1862, inclusive, after which the said certificates of indebtedness shall be converted into the stock of the company at par.

I certify the foregoing to be a true copy.

J. I. ATKINSON,
Secretary.

The following are depositions taken on the part of the B. & O. R. R. Company, and filed in the cause above, November 1, 1866.

John King, junior, a witness of lawful age, produced on the part of the company, being first duly sworn, deposed and says as follows:

First question. Where do you reside?

Answer. In Baltimore.

Second question. What office do you hold in the Baltimore & Ohio Railroad Company?

Answer. The office of auditor.

Third question. You are the regular accounting officer of the company, are you not?

Answer. Yes, as auditor, and as such have charge of the company's accounts.

Fourth question. Did you hold the same office during the year 1863 or 1864?

Answer. Yes.

Fifth question. State if you know, or can estimate, the proportion of the amount of net income derived by the company from that part of the road lying in West Virginia during the year ending thirty-first of January, 1864, to its capital invested in West Virginia.

Answer. I estimate the gross earnings of the main stem within the limits of West Virginia during that year at two million four hundred and ten thousand six hundred and eighty-six dollars and seventy-six cents, ($2,410,686 76.) I estimate the cost of working the road in West Virginia at [page 54] sixty (60) per cent. of the gross earnings, making the cost of operating that portion of the line one
51 million four hundred and forty-six thousand four hundred and twelve dollars and five cents, ($1,446,412 05;) the net earnings upon this basis being nine hundred and sixty-four thousand two hundred and seventy-four dollars and seventy-one cents, ($964,274 71.) In the annual report for the year ending the thirtieth (30th) of September, eighteen hundred and sixty-three, (1863,) the cost of the road is stated at eighteen million five hundred and fifteen thousand six hundred and sixty-six dollars and eight cents, ($18,515,666 08;) second track, one million five hundred and fifty-one thousand two hundred and thirty-eight dollars and six cents, ($1,551,238 06;) rolling power, three million six hundred and twenty-one thousand seven hundred and fifty-five dollars and three cents, ($3,621,755 03;) real estate, one million two hundred and fifty-six thousand four hundred and thirty-four dollars, ($1,256,434;) making a total of twenty-four million nine hundred and forty-five thousand and ninety-three dollars and seventeen cents ($24,945,093 17) of these items. I estimate that of the cost of the road, seven million dollars ($7,000,000) is for the territory of Maryland; second track, seven hundred and fifty thousand dollars, ($750,000;) rolling power, one million five hundred thousand dollars, ($1,500,000;) and real estate, nine hundred thousand dollars, ($900,000;) making a total of ten million one hundred and fifty [page 55] thousand dollars, ($10,150,000;) leaving fourteen million seven hundred and ninety-five thousand and ninety-three dollars and seventeen cents ($14,795,093 17) as the cost of the road, second track, rolling power, and real estate invested in West Virginia. Besides which the Baltimore & Ohio Railroad had, on thirty-first (31st) of

January, eighteen hundred and sixty-four, (1864,) capital invested in the Northwestern Virginia railroad, amounting to five million seven hundred and forty-four thousand four hundred and thirty dollars and eight cents, ($5,746,430 08;) making a total amount of capital invested in West Virginia of twenty million five hundred and thirty-nine thousand five hundred and twenty-three dollars and twenty-five cents, ($20,539,523 25;) and making the net earnings of the capital invested in West Virginia four and seven-tenths (4 7-10) per cent.

Sixth question. Explain by what means you arrive at the estimates you have given of income and capital in West Virginia.

Answer. The main stem of the Baltimore & Ohio Railroad was in full operation over its entire length two [page 56] hundred and ninety-three (293) days of the year, ending thirty-first (31st) 52 of January, eighteen hundred and sixty-four, (1864,) and was partially closed seventy-two, (72) days of that year. To determine the amount of freight earnings in West Virginia, we ascertained from the records of the company the freight earninigs in West Virginia during March, eighteen hundred and sixty-three, (1863,) in which month the road was open for its entire length; and for July, eighteen hundred and sixty-three, (1863,) during which time the road was partially closed; and computed the proportion of those earnings to the total freight earnings of the main stem during the same months, and applied the per centages thus ascertained to the whole freight earnings of the year ending thirty-first (31st) January, eighteen hundred and sixty-four, (1864.) For passengers, we ascertained, in the same way, the per centage earned in West Virginia, of the total earnings from passengers, in February, eighteen hundred and sixty-three, (1863,) during which month the road was open throughout its entire length, and applied the per centage to passenger earnings from the main stem for the two hundred and ninety-three (293) days before mentioned, and for the seventy-two (72) days that the road was partially closed, we estimated pas- [page 57] senger receipts in West Virginia, on the basis of tonnage for July, eighteen hundred and sixty-three, (1863,) ascertained as before mentioned. Owing to the manner in which the accounts of passenger receipts were kept, we could not get accurate statements of the amount from that source in West Virginia, during any month when the road was partially closed, and therefore found the tonnage basis for July the most accurate one for computing the passenger receipts during the seventy-two (72) days, supposing that the passenger business fell off in about the same ratio as the tonnage. In further explanation of this matter, I file herewith certain statements showing the computations presented. (Witness here filed the papers marked Exhibit J, K, I, No. 1, No. 2, and No. 3.)

Seventh question. State whether or not, in your opinion, the estimates, made in the way you have explained, show fairly and accurately the income from the road in West Virginia.

Answer. Yes.

Eighth question. State whether or not the annual report of the

company for the year ending September 30th, 1863, shows correctly what ought to be charged as working expenses during that year.

Answer. It does not show correctly the entire amount of the working expenses of that year, and I call your attention, in [in] this connection, to the statement of the president [page 58] of the
53 company, on page seven (7) of that annual report. He says: "The repeated invasions of the territory traversed by the Baltimore & Ohio road, resulting in protracted hostile occupation of the line, precluded the company from effecting many requisite repairs, and delayed the restoration of numerous important bridges and other structures. It is proper, therefore, to repeat the remark made in regard to the business of the preceding year as equally applicable to the present, viz: A large amount of repairs that should have been made and the expenses of which would have legitimately attached to this fiscal year, could not be accomplished. The financial results should, therefore, be regarded as subject to the modifications of necessary expenditures to restore and maintain the damaged equipment and property of the company."

Cross-examination on the part of the defendants:

First question. How much of the main stem of the Baltimore & Ohio railroad is in Maryland, and how much in West Virginia?

Answer. Two hundred and forty-three (243) miles in West Virginia, and one hundred and thirty-six (136) miles in Maryland.

Second question. If freight were shipped in Maryland for a point in West Virginia, or the reverse, how would [page 59] the net proceeds of that freight be computed in the calculation which you have made?

Answer. Pro rata.

Third question. I ask the same question with regard to passengers.

Answer. Pro rata.

Fourth question. Upon what principle do you compute or estimate the quantity of rolling power used in the two States?

Answer. Upon the length of the road in the two States, and the different character of the business; as it requires much more rolling power to earn the same amount in West Virginia than it does in Maryland, owing to the high grades, &c., in West Virginia.

Fifth question. Is not a considerable portion of the rolling power used in common in both States?

Answer. Some is, certainly.

Sixth question. You have stated the gross earnings of the road in West Virginia for the year ending January thirty-first, (31st,) eighteen hundred and sixty-four, (1864,) as estimated by you, and the net earnings estimated for the same period; can you state the gross and net earnings of the entire main stem during the same time, or give any approximation to them?

54 Answer. I can give the gross earnings. They are five millions eight hundred and twenty-three thousand [page 60] twenty-five dollars and seventy-three cents, ($5,823,025 73.) I cannot give the net earnings.

Seventh question. Would the cost of working the entire main stem

exceed or equal the per centage at which you have estimated the costs of working that portion of the road which lies in West Virginia?

Answer. It would not exceed or equal it.

Eighth question. What was the capital stock of the Baltimore & Ohio railroad between the first of February, eighteen hundred and sixty-three, (1863,) and January thirty-first, eighteen hundred and sixty-four, (1864?)

Answer. Thirteen million one hundred and sixteen thousand five hundred dollars, ($13,116,500,) exclusive of preferred stock in the State of Maryland, amounting to three million dollars, ($3,000,000.)

Ninth question. You have stated the capital invested by the Baltimore & Ohio Railroad Company in the Northwestern Virginia railroad; can you furnish the items of which the aggregate statement is composed?

Answer. I can. They are as follows: Amount due Baltimore & Ohio Railroad Company for cash advances, bills receivable, &c., $3,044,430 08; amount paid city of Baltimore for its claim against Northwest Virginia Railroad Company, $1,200,000; endorsement of second mortgage bonds, $1,000,000; endorsement of third mortgage bonds, $500,000; making a total of $5,744,430 08.

Tenth question. In speaking of working ex-[page 61] penses, do you include the cost of repairs?

Answer. I do.

Eleventh question. Explain the position of the three millions of the preferred stock belonging to the State of Maryland; is it included in the amount upon which dividends are declared, or does the company pay interest upon the three millions? If the latter, state what rate of interest.

Answer. It is not included in the ordinary dividends of the company; it is preferred stock, upon which we guarantee six per cent., and no more.

And further this deponent saith not.

JOHN KING, JR.

NOVEMBER 1*st*, 1866.

Joshua I. Atkinson, a witness of lawful age, produced on
55 the part of the complainants, being first duly sworn, deposes and says as follows:

First question. Where do you reside?

Answer. In Baltimore.

Second question. Have you been the treasurer of the Baltimore & Ohio Railroad Company for many years, including the years 1863 and 1864?

Answer. Yes.

Third question. State whether the receipts and [page 62] disbursements of that company were made, and the accounts of them kept, in the paper currency of the United States, during the years 1863 and 1864?

Answer. They were.

Fourth question. What was that currency worth during the year 1863, as compared with specie?

Answer. From the best information I can get, the average value was about one hundred and fifty dollars of currency for one hundred dollars of gold.

Fifth question. State whether the capital invested by that company in Virginia, (now West Virginia,) as invested and as represented on the books of the company in the year 1863, and afterwards, was in specie or its equivalent?

Answer. At the time the investment was made it was at par; the paper money was equivalent to gold, and is so represented on the books of the company.

Cross-examination:

First question. When was the Baltimore & Ohio Railroad finished in the State of Maryland?

Answer. It was opened to Cumberland, Maryland, on the fifth of November, 1842; that portion of the road that lies west of Cumberland, Maryland, was made afterwards.

Second question. When was the road finished in the State of Virginia?

Answer. In January, 1853, I think.

Third question. In the answer of the Baltimore & Ohio Railroad Company, John W. Garrett and yourself, [page 63] to the bill filed against them in the circuit court of Marshall county, by the supervisors of said county, and Jackson Reed, sheriff of the same, it is stated that the invested capital of the company, in the fiscal year ending on the thirtieth day of September, 1862, was thirty-two millions six hundred and fifty thousand six hundred and forty-three dollars and seventeen cents. Please explain what items compose that sum as well as you can.

56 Answer. I file herewith a statement showing how that result is obtained, marked Exhibit "J. I. A., No. 1." The statement "A" referred to in that paper is the statement marked "A" on page 16 of the thirty-sixth annual report of the president and directors to the stockholders of the Baltimore & Ohio Railroad Company, as printed. I also, now, at the suggestion of counsel for the defendants, file six paper writings, marked Exhibits "J. I. A., Nos. 2, 3, 4, 5, 6 and 7." These papers show the items making up the aggregate of capital invested from the years 1856 to 1861, both inclusive, as stated in said answer. The statement "A," referred to in each of these papers, will be found in each of the printed annual reports for those years, marked "A," among the treasurer's annual statement.

And further this deponent saith not.

J. I. ATKINSON.

STATE OF MARYLAND, *Baltimore City, to wit:*

I, Joseph T. Atkinson, a commissioner of the State of West Virginia, for the State of Maryland, resident in Baltimore city, do hereby certify that the foregoing depositions of John King, junior, and Joshua I. Atkinson, were duly taken by me, pursuant to the annexed notice, at the time and place in the annexed notice specified,

except the testimony taken of Joshua I. Atkinson, which was taken at the office of Joseph [page 64] T. Atkinson, No. 36 St. Paul street, in the city of Baltimore and State of Maryland, subsequent to an adjournment, which was done by consent of counsel in my presence, and at there request; and I do further certify that, at the time of so taking the same, I was a commissioner of the State of West Virginia, for the [the] State of Maryland, resident at Baltimore city, which examination being now completed, and neither party desiring further time, I now send and certify the same unto the said circuit court of Marshall county, in the State of Virginia.

In testimony whereof, I hereunto subscribe my name and affix my official seal on the first day of November, eighteen hundred and sixty-six, Joseph T. Atkinson, a commissioner of the State of West Virginia, for the State of Maryland, resident at Baltimore city.

Cost of execution of within commission, $10, paid by complainants.

JOSEPH T. ATKINSON,
Commissioner.

57 *Statement No. 1.—Tonnage.*

Total revenue from tonnage on main stem during the year ending 31st January, 1864, per statement "A"	$4,452,700 74	
Proportion of above earned during that portion of said year in which the road was in full operation, (293 days)	3,574,359 77	
Proportion (of above portion) earned within the State of West Va., estimated on the basis of tonnage for March, 1865, namely: 239.566 47 / 490,128 09 is		$1,747,043 93
Portion of total ($4,452,700 74) earned during that part of said year in which the road was partially closed, (72 days)	878,340 97	
Proportion (of said proportion) earned within the State of West Virginia, estimated on the basis of tonnage for July, '63, namely: 14.258 84 / 94,972 31 is		131,871 31
Total proportion of revenue from tonnage earned within the State of West Va., on the main stem, during the year ending 31st January, 1864		1,878,915 24

Endorsed: Exhibit No. 1.

J. K., Jr.

58 *Statement No. 2.—Passengers.*

Total revenue from passengers on main stem during the year ending 31st January, 1864, as per statement "A"	$1,370,324 99	
Portion of above earned during that part of said year in which the road was in full operation, (293 days)	1,100,014 30	
Proportion (of above portion) earned in West Virginia, estimated on basis of passenger revenue for the month of February, '63, namely: 19,693 62 / 43,694 00 is		$495,794 92
Portion of above total ($1,370,324 99) earned whilst road was partially closed, (72 days)	270,310 69	
Proportion of above portion earned in West Virginia, estimated on basis of tonnage for July, '63, 14,258 84 / 94,972 31; thus: As 239/490 : 19/43 :: 14/95 = 111/834 is		35,976 60
Total West Virginia proportion of main stem revenue from passengers during the year ending 31st January, 1864		531,771 52

Endorsed: Exhibit No. 2.

J. K., Jr.

59 *Recapitulation.*

West Virginia proportion of revenue from tonnage as per statement No. 1	$1,878,915 24
West Virginia proportion of revenue from passengers as per statement No. 2	531,771 52
Total proportion of main stem revenue for the year ending 31st January, 1864, earned within the limits of the State of West Virginia	2,410,686 76
Total revenue main stem	5,823,025 73

Endorsed: Exhibit No. 3.

J. K. Jr.

Statement of capital invested 30th September, 1862.

Total amount assets per statement "A"	$33,673,564 20	
Add. N. W. Va. guarantee	1,500,000 00	
		$35,173,564 20

(Deduct.)

Cash in hands of officers for disbursement	$2,054 75	
Outstanding dues	107,542 25	
Uncollected revenue	2,392,142 17	
Balance in treasury	21,181 86	
		2,522,921 03
Capital invested		$32,650,643 17

Endorsed: Exhibit No. 1.

J. I. A.

60 *Statement of capital invested 30th September*, 1856.

Total amount of assets, statement "A"	$26,900,956 91	
Add N. W. Va. guarantee	1,500,000 00	
		$28,400,956 91

(Deduct per statement "A."*)

Cash in hands of officers for disbursement	$54,535 14	
Outstanding dues	12,584 77	
Uncollected revenue	270,463 99	
Balance in treasury	427,655 04	
		$765,238 94
Capital invested		$27,635,717 97

Statement of net income for the fiscal year ending 30th Sept., 1856.

Revenue M. S. statement "B"	$4,385,951 87	
Washington branch dividends	86,428 00	
L. Hoge	150 00	
W. L. Randolph	10 00	
		$4,472,539 87

(Deduct)

Expenses	$2,384,779 54	
Do	60 00	
Old claims of J. Dunlop	1,835 77	
Discount on bonds of city of Balt	21,948 13	
Ground rents	26,419 29	
Virginia State tax on passengers	5,838 43	
		$2,440,881 16
Net income		$2,031,658 71

*The statement "A" referred to in the above is found on page 15 of the printed 30th annual report.

In explanation of above, see statement "B" and "C" on the printed 30th annual report, p. 16 and 17.

Endorsed: Exhibit No. 2.

J. I. A.

61 *Statement of capital invested 30th September*, 1857.

Total amount assets statement "A"	$28,725,268 94	
Add N. W. Va. guarantee	1,500,000 00	
		$30,225,268 94
(Deduct per statement "A.")		
Cash in hands of officers for disbursement	$11,911 49	
Outstanding dues	20,761 78	
Uncollected revenue	326,762 99	
Balance in treasury	82,644 78	
		442,081 04
Capital invested		$29,783,187 90

Statement of net income for the fiscal year ending 30th September, 1857.

Revenue M. S. per statement "B"	$4,616,998 95	
Washington branch dividend	91,512 00	
Cash rec'd for property sold for taxes	163 08	
Cash rec'd for unclaimed dues	99 75	
		$4,708,773 78
(Deduct.)		
Loss on claim ag'st estate M. Danna, dec'd	$114 16	
Discounts on bonds of city of Balt.	17,817 97	
Ground rents	26,746 20	
Virginia State tax on passengers	13,354 26	
Expenses	2,760,785 14	
		2,818,818 03
Net income		$1,889,955 75

Endorsed: Exhibit No. 3.

J. I. A.

62 *Statement of capital invested 30th September*, 1858.

Total amount assets statement "A"	$29,400,161 26	
Add am't N. W. Va. guarantee	1,500,000 00	
		$30,900,161 26

(Deduct per statement "A.")

Cash in hands of officers for disbursement	$13,245 73	
Outstanding dues	27,715 71	
Uncollected revenue	304,752 94	
Balance in treasury	72,185 41	
		417,899 79
Capital invested		$30,482,261 47

Statement of net income for the fiscal year ending 30th September, 1858.

Revenue M. S. per statement "B"	$3,856,485 79	
Washington branch dividends	45,756 00	
" " "	45,756 00	
	91,512 00	
W. H. Malone	2 50	
		$3,948,000 29

(Deduct.)

Expenses "B"	$2,531,199 29	
Discount on bonds of city of Balt	46,405 31	
Ground rents	25,539 26	
Virginia State tax on passengers	14,320 21	
		2,617,464 07
Net income		$1,330,536 22

Endorsed: Exhibit No. 4.

J. I. A.

63 *Statement of capital invested 30th September, 1859.*

Total am't assets statement "A"	$30,278,376 88	
Add am't N. W. Va. guarantee	1,500,000 00	
		$31,778,376 88

(Deduct.)

Mail service from 1st July to 30th Sept., 1859	$31,421 06	
Cash in hand of officers for disbursements	2,054 75	
Outstanding dues	69,556 22	
Uncollected revenue	264,981 32	
Balance in treasury	226,583 12	
		594,596 47
Capital invested		$31,183,780 41

Statement of net income for the fiscal year ending 30th September, 1859.

Revenue M. S. "B"		$3,618,618 45	
Washington branch dividends	$45,756 00		
" " "	$45,756 00		
		$91,512 00	
			$3,710 130 45
(Deduct.)			
Expenses		$1,684,997 84	
Discount on bonds of city of Balto.		1,199 53	
Ground rents		25,319 63	
Virginia State tax on passengers		11,593 90	
			$1,723,110 90
Net income			$1,723,110 90

Endorsed: Exhibit No. 5.

J. I. A.

64 *Statement of capital invested 30th September, 1860.*

Total am't assets per statement A	$31,241,011 79	
Add N. W. Va. guarantee	1,500,000 00	
		$32,741,011 79
(Deduct.)		
Cash in hands of officers for disbursement	$2,054 75	
Outstanding dues	96,368 80	
Uncollected revenue	370,225 62	
Balance in treasury	550,867 12	
		1,019,516 29
Capital invested		$31,721,495 50

Statement of net income for the fiscal year ending 30th September, 1860.

Revenue M. S		$3,922,202 94	
Washington Branch div'd,	$45,756 00		
" " "	45,756 00		
		91,512 00	
			$4,013,714 94
(Deduct.)			
Expenses		$1,616,615 61	
Compromise of suit of E. Brown, of 1856		2,000 00	
Compromise of suit of W. Brindley, of 1858		850 00	
Cash paid for coal per Great Eastern		3,380 00	

Western Telegraph Company	2,191 29	
Ground rents	25,836 71	
		$1,650,873 59
Net income		$2,362,841 35

Endorsed: Exhibit No. 6.

J. I. A.

65 *Statement of capital invested 30th September, 1861.*

Total amount assets per statement "A"	$31,638,934 33	
Add N. W. Virginia guarantee	1,500,000 00	
		$33,138,934 33
(Deduct.)		
Cash in hand of officers for disbursement	$2,054 75	
Outstanding dues	94,163 03	
Uncollected revenue	885,176 26	
Balance in treasury	30,565 20	
		$1,011,959 24
Capital invested		$32,126,975 09

Statement of net income for the fiscal year ending 30th Sept., 1861.

Revenue of M. S.	$3,211,425 70	
Washington branch dividend	$45,756 00	
" " "	45,756 00	
	91,512 00	
		$3,302,937 70
(Deduct.)		
Expenses	$1,391,094 91	
Ground rents	25,540 78	
		$1,416,635 69
Net income		$1,886,302 01

Endorsed: Exhibit No. 7.

J. I. A.

66 The costs of the two within cases as follows:

Baltimore & Ohio Railroad Company vs. Supervisors of Marshall county et al. Plaintiff's costs, $26 12; defendants' costs, $15 76.

Supervisors of Marshall county et al. vs. Baltimore & Ohio R. R. Co. Plaintiff's costs, $22 26; defendants' costs, $ ———.

I, Walter Evans, clerk of the circuit court of Marshall county, in

the State of West Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings of said two causes in said court, except the process and returns and orders at rules and notices for taking depositions, &c.

Teste:

WALTER EVANS, *Clerk.*

Clerk's fee for making this transcript of record, $21 66.

Teste:

WALTER EVANS, *Clerk.*

67 In the supreme court of appeals of West Virginia.

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
THE SUPERVISORS OF MARSHALL COUNTY, &c.

The following is the process issued in the foregoing cause, together with the sheriff's return thereon made.

The State of West Virginia to the sheriff of Marshall county, greeting:

We command you that from all further proceedings on a decree rendered by the circuit court of Marshall county, on the 9th day of April, 1867, in a cause in which the Baltimore and Ohio Railroad Company was complainant, and the supervisors of Marshall county, and Jackson Reed, were defendants, you altogether supersede; which decree before the judges of our supreme court of appeals at Wheeling, for cause of error in the same to be corrected on the petition of the Baltimore & Ohio Railroad Company, we have caused to come. We also command you that you give notice to the supervisors of Marshall county, and Jackson Reed, that they be before the judges

68 of our said supreme court of appeals at Wheeling aforesaid, on the first Monday in July next, then and there to have a rehearing of the whole matter in the decree aforesaid contained, and have then there this writ.

Witness Sylvanus W. Hall, clerk of the said supreme court of appeals, the 7th day of June, 1867, and in the 4th year of the State.

SYLVANUS W. HALL.

The clerk of the circuit court will endorse the name and residence of the security on this writ.

Endorsement.

Memo.—The effect of this writ is suspended until certificate of the due execution of said bond is endorsed on this writ by the clerk of the circuit court of Marshall county.

Teste:

SYLVANUS W. HALL, *Clerk.*

THE STATE OF WEST VIRGINIA, *Marshall County, ss:*

I hereby certify that the above-mentioned bond has been given; J. B. Ford, F. H. Hobbs, and James Burley, sureties.
69 Given under my hand this 8th day of June, 1867.

WALTER EVANS,
Clerk of the Circuit Court of Marshall County.

Sheriff's return.

Executed on Jackson Reed, and the board of supervisors, by delivering to each a copy of the within, this June 20th, 1867.

S. E. BLOYD, *D. S.*,
For H. KELTZ, *S. M. C.*

Bond.

Know all man by these presents, that we, Jas. B. Ford, J. H. Hobbs, and James Burley, are held and firmly held unto the State of West Virginia in the sum of fifteen thousand dollars, to be paid to said State; to the which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 7 day of June, 1867.

The condition of the above obligation is such, that whereas the Baltimore & Ohio Railroad Company hath obtained an appeal
70 to operate as a supersedeas to the supreme court of appeals of West Virginia, from a decree of the circuit court of Marshall county, pronounced on the 9th day of April, 1867, in a cause then therein pending, in which the said Baltimore and Ohio Railroad Company was complainant, and the supervisors of the county of Marshall, and Jackson Reed, sheriff of said county, were defendants, by which [by which] an injunction thereto previously awar ded the company was dissolved and the bill dismissed, which appeal was to take effect upon giving bond as by the order allowing the same was present:

Now, if the said Baltimore & Ohio Railroad Company shall prosecute the said appeal with effect, or in case the said decree shall be affirmed, shall pay and satisfy all the said taxes and levies in the said bill mentioned, and the collection of which restrained by said injunction, together with the interest that shall have lawfully ac-
71 crued thereon from the time when the same should have bee n collected, and shall moreover pay and satisfy all such acts and damages as shall be awarded against said company, by reason of its said appeal, then the above obligation to be void, else to remain in full force and virtue.

J. B. FORD. [SEAL.]
J. H. HOBBS. [SEAL.]
JAMES BURLEY. [SEAL.]

[U. S. stamp, $1 00.]

A copy. Teste:

WALTER EVANS,
Clerk of the Circuit Court of Marshall County, W. Va.

WEST VIRGINIA, *ss:*

At a supreme court of appeals, held in the city of Wheeling on the 3rd day of August, 1867.

THE BALTIMORE & O. R. R. CO., appellant,
vs.
THE SUPERVISORS OF MARSHALL COUNTY, &c., appellees.

Upon an appeal from a decree of the circuit court of Marshall county.

72 For reasons appearing to the court, this cause is continued until the next term.

And at another day, to wit, on the 24th day of February, 1868:

On motion of the appellant, it is ordered that this cause be continued until the next term.

And at another day, to wit, on the 29th day of July, 1868:

This day came the appellant, by Messrs. Lee and Boggess, its counsel, and the appellees, by Messrs. Stanton and Lamb, their counsel; and this cause was partly heard upon the transcript of the record of the decree aforesaid, and is continued until to-morrow for a further hearing.

And at another day, to wit, on the 30th day of July, 1868:

This day came again the parties, by their counsel, and this cause was fully heard upon the transcript of the record of the decree aforesaid and the arguments of counsel; but because the court is

73 not advised of its judgment to be given, time is taken to consider thereof.

And at another day, to wit, on the 25th day of January, 1869:

THE BALTIMORE & OHIO RAILROAD COMPANY, appellant,
vs.
THE SUPERVISORS OF MARSHALL COUNTY, and Jackson Reed, sheriff of said county, appellees.

Upon an appeal from a decree of the circuit court of Marshall county, pronounced on the 9th day of April, 1867, in a cause in which the appellant was complainant and the appellees were defendants:

The court, having maturely considered the transcript of the record of the decree aforesaid, together with the argument of counsel thereupon, and it appearing from the record that the net income of the Baltimore & Ohio railroad, for the year 1864, the year for which the taxes in dispute were assessed, as well as for the preceding year, did exceed six per centum upon the capital invested in said

74 road, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said decree. Therefore it is adjudged, ordered, and decreed, that the said decree be afirmed, and that the appellant do pay to the appellees damages according to law, and also their costs by them about their defence of the said appeal in this court expended, which is ordered to be certified to the circuit court of Marshall county.

The "reasons stated in writing and filed with the record," referred to in the foregoing order, are in the words and figures following, to wit:

75 THE BALTIMORE & OHIO RAILROAD COMPANY, appellant,
v.
THE SUPERVISORS OF MARSHALL COUNTY, appellee.

The Baltimore and Ohio Railroad Company was charged on the personal property books of the assessor for the first or upper district of the county of Marshall, for the year 1864, with property of the value of $315,000, and was charged on the said books, on account of said property, with a State tax, for general purposes, of the sum of $945 00, and with a further State tax, for the support of free schools, of the sum of $315 00, and with a county tax or levy, of the sum of $6,331 50—making, in all, the sum of $7,591 50. When the sheriff of said county was about to levy for and proceed to collect the said taxes, so charged, the said company obtained an injunction restraining him from levying for and collecting said taxes. The case came on to be heard in the circuit court of Marshall county, at the April term, 1867, of said court, when the court dissolved the injunction, and dismissed the complainant's original and amended bills, so as to allow the said sheriff to proceed with the collection of the said taxes; but the said company, not being satisfied with the decree dissolving the injunction, has appealed to this court to have the case reviewed.

The petitioner assigns six different causes of error in the decree complained of, all denying, in substance, that the property of the said petitioner is liable for either the State or county taxes charged on the said property.

The Baltimore and Ohio Railroad Company was chartered by an act passed by the general assembly of the State of Maryland on the 28th of February, 1827. The 22d section of said act provides, "That if the said road shall not be commenced in two years from the passage of this act, and shall not be finished within this State in ten years from the time of the commencement thereof, then this act shall be null and void."

This Maryland charter was confirmed by the general assembly of Virginia, with certain conditions and restrictions not material to this case, by an act passed on the 8th day of March, 1827.

In 1836, 1837, 1838, and 1839, other acts were passed by Virginia authorizing conditional subscriptions to the work of the company;

the act of 1838 also extending the time for the completion of the work in Virginia until the 4th day of July, 1843, upon the conditions mentioned in said act. The conditions mentioned in these several acts were never complied with, nor the subscriptions therein provided for made, but the road was nevertheless completed in 1843 as
76 far as Cumberland. The work upon the road in Virginia, between Harper's Ferry and Cumberland, must have been done after the expiration of the time limited in the charter, without any extension thereof, except the extention mentioned in the act of 1838, which never took effect, because it was dependent upon conditions never complied with.

In 1844–'45, and in 1845–'46, other acts were passed proposing terms and conditions upon which the company might complete its road through Virginia, but neither of these acts was accepted by the company. On the 6th of March, 1847, another act was passed, which was accepted by the company, and under which the company completed its road through Virginia, subject to such parts of its original charter as remain unaltered.

It is claimed here in behalf of the appellees that the act of March 8, 1827, constitutes no part of the charter of the Baltimore and Ohio Railroad Company, but that the act of March 6, 1847, and the general railroad law refered to in the last-named act, constitute the charter of said company, for the reason that the road was not completed in the time named in the act of 1827, whereby the act became null and void, and for the further reason that, if the said act did not become null and void, it was entirely superseded by the act of 1847.

In the case of the Baltimore and Ohio Railroad Company vs. Galahue's adm'rs, 12 Gratt., 655, it was held that the Baltimore and Ohio Railroad Company was a Virginia corporation by virtue of the act of March 8, 1827, thus recognizing the existence of the act. But it is claimed by the counsel for the appellees that this case is not authority, because the effect of the 22d section, declaring the charter null and void if the road was not completed in the time specified, was not considered by the court. This question could not have been considered by the court, because the act of 1827 had been accepted, and the company had become a corporation under it, and had made its road as far as Cumberland before the passage of the act of 1847, so that, although the charter was, perhaps, at the time of the passage of the act of 1847, forfeited, yet that question could only be raised by a proper proceeding in the name of the State against the company, to judicially determined and declare the forfeiture and annul the charter, 2 Kent. Com., 393; the King vs. Amery, 2 Term Rep., 515; Canal Company vs. Railroad Company, 4 Gill. and Johnson, 1; Thomas vs. the People, 23 Wendell, 535; Angell & Ames on Corporations, sec. 777; Crump, &c., vs. United States Mining Co., 7 Gratt., 352.

Although the charter of an incorporated company may be forfeited, yet the government which granted the charter may not choose to enforce the forfeiture, and it seems that if the charter of the Baltimore and Ohio Railroad Company was in fact for-

77 feited, as claimed by counsel, the State of Virginia did not choose to enforce such forfeiture.

It seems to me quite plain that the charter of 1827 has not become inoperative by reason of the section declaring it void if the road was not completed in the time specified. Nor do I agree that the act of 1827 is wholly superseded by the act of 1847. The act of 1847 could not have been intended as a substitute for the act of 1827, but was intended to authorize the Baltimore and Ohio Railroad Company, which is recognized by the act itself as an existing company, to complete its road through the State of Virginia under the act of 1827, subject to the restrictions and upon the conditions imposed on the company by the said act of 1847. Such must have been the view taken by the court in the case of the Baltimore and Ohio R. R. Co. vs. Gallahue.

The question may be asked, why was it that the company accepted the act of 1847, if its charter under the act of 1827 was not forfeited? That the State had no power to impose on the company without its consent the act of 1847, is clear. But the reason why the company accepted the terms proposed in the act, was probably because it was supposed that if the company went on to complete the road under the original charter, proceedings would be taken to vacate its charter.

It is, however, not necessary to inquire for the reasons why the company accepted the act of 1847. The fact exists that it did accept it, and the effect is the same, no matter what the reason for accepting it may have been.

The act of 1847 having been accepted by the company, together with the act of 1837, establishing general regulations for the incorporation of railroad companies so far as properly applicable, became part of the charter of said company along with the act of 1827, the act of 1827 giving way to both or either of the acts of 1847 or 1837, whenever inconsistent with them or with either of them.

The 18th section of the original charter contains this provision: "The shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law."

The 23d section of the act of 1837, prescribing general regulations for the incorporation of said railroad companies, provides that "All machines, wagons, vehicles, or carriages belonging to any company incorporated subject to the provisions of this act, together with all their works, and all profits which shall accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, and shall be deemed personal estate."

The 7th section of the act of March 6th, 1847, provides "That the stock, property, and profits of said company, so far as the same may be, or accrue within this commonwealth, shall be subject to
78 general taxation in like manner, and on the same footing with other similar companies within this State: Provided, however, That said taxing power shall not be exercised until and unless the nett income of said Baltimore and Ohio railroad shall exceed six per centum per annum upon their capital invested."

The controversy in this case depends upon the construction to be given to these three sections, contained in the three different acts referred to, upon the facts as they appear in the record.

The valuation of the property of the company was ascertained and placed upon the books of the assessor for taxation under the fifty-third section of the "Act to provide for the assessment of taxes," passed by the legislature of this State December 3d, 1863, the officers of said company having failed to make out and return to the assessor a list of property under the fifty-second section of the said act.

The first cause assigned for error by the petitioner is that: "The Baltimore and Ohio Railroad Company having been by the act of the 6th of March, 1847, which was accepted by said company, declared subject in all respects to the act establishing general regulations for the incorporation of railroad companies, passed March 11th, 1837, and by the 23d section of the last-named act, it being declared that the property and profits of a railroad company should be vested in the several stockholders thereof, in proportion to their respective shares, and declared to be personal estate, it follows that the property and profits of the petitioner could only be assessed and charged with taxes in the names of the general stockholders in whom the same was vested in proportion to their respective shares, and could not be so assessed and charged in the name of the company in which said property and profits were not vested."

If it be true that the property belonging to the company might be assessed and charged with taxes in the names of the several stockholders by the necessary legislation, it does not follow that if not so taxed it cannot be assessed and charged with taxes in the name of the company. But what is the meaning of the 23d section of the act referred to? The language is, "All machines, wagons, vehicles, or carriages belonging to any company, &c., shall be vested in the respective shareholders," &c. Can property belong to a company without being vested in the company? But who or what constitutes the company? The respective shareholders in proportion to their respective interests. The obvious meaning of the section then must be that the property belonging to the company is vested in the shareholders in their corporate capacity, and not as individuals or natural persons, and is consequently taxable in the name of the company.

The second cause of error assigned is, that:

79 "If the property or profits in possession of your petitioner for the benefit of the stockholders, who were the owners thereof under the law, could be at any time assessed and charged with taxes in the name of your petitioner; yet that under the 7th section of the act of March 6th, 1847, which created the only qualification to the total exemption from taxation granted by the original charter of the company, the taxing power thereby reserved was only to be exercised when and after the nett income upon the capital invested in the State of Virginia, and, after its creation, in the State of West Virginia, should exceed the rate of six per centum per annum,

and upon the pleadings and proofs in the cause it is not made to appear that such nett income has exceeded the rate of six per centum per annum upon the capital invested in said States; and so that the time has not yet arrived at which, nor has the condition happened upon which, the said taxing power could lawfully be exercised over the said property and its profits."

The language used by the petitioner that the taxing power reserved "was only to be exercised when and after the nett income upon the capital invested in the State of Virginia, and, after its creation, in the State of West Virginia, should exceed the rate of six per centum per annum," is not contained or used in the section referred to. The Baltimore and Ohio railroad extends from the city of Baltimore through the territory of the States of Maryland and West Virginia to the city of Wheeling, and is the work of the Baltimore and Ohio Railroad Company, and there can be no good reason assigned why the section should not be construed as it is written and be held to mean what the words used import.

The language used in the proviso referred to and before quoted, is, "that the said taxing power shall not be exercised until and unless the nett income of the Baltimore and Ohio railroad shall exceed six per centum per annum upon their capital invested." Capital how invested, it may be asked. Invested in and upon the railroad according to the terms of the charter. The language cannot be limited, as claimed by the petitioner, to that portion of the railroad which is now in this State, but must be held to apply to the entire road, and to the capital invested upon the road. It is quite clear, from the pleadings and proofs in the cause, that the nett income of the said road for the year 1864, for which year the taxes are charged, as well as for the preceding year, did exceed largely six per centum upon the capital invested upon said road. And if the figures given by Mr. King, the auditor of the company, be correct—but if not correct, the error is in favor of the company—the nett income of the road exceeded six per centum for the year 1864 upon the capital invested on said road in this State.

80 Mr. King estimates the cost of the road, second track, rolling power, and real estate in this State, at $14,795,093 17. He estimates the nett earnings of that part of the road which is in this State at $964,274 71 for the year 1864. The amount stated as the nett earnings or income of the road will be found upon calculation to exceed six per centum, upon the amount stated as invested in the road in this State, by the sum of $76,569 12. So that, if the pretentions of the petitioner were even correct, the property of the company taxed was subject to taxation at the time it was taxed.

The third cause of error assigned is that:

"It is clear, from the said act last referred to, that before the said taxing power was to be exercised, it was the intention of the legislature that it should be first ascertained and declared by act or resolution of that body, or by some other appropriate method under its authority; that the condition had happened upon which the taxing

power might lawfully be exercised, and it was not to be left to the local officer of any one of the counties through which the road passed to take upon himself the duty of determining that question. No such act or resolution was passed by the legislature of Virginia, or by that of West Virginia, nor was it ever ascertained by any competent authority under either that the nett profits of the road had reached the point at which taxation might commence."

The power in the act declaring when the taxing power should be exercised, is part of the contract between the State and the company, not to be changed by either without the consent of the other.

When the property of the company should become liable to taxation, is a question of fact, and whenever the fact mentioned exists, the liability to taxation exists also. No act or resolution of the legislature could make the property of the company liable to taxation before the fact occurs. Any such act or resolution would impair the obligation of the contract, and consequently violate the constitutions of the United States and of this State, and be null and void. And when the liability to taxation exists, the legislature cannot, under the limitations of the constitution of the State, release the property of the company, or any part thereof, from taxation, unless it might be upon some new consideration moving from the company, such as, for instance, the modification or surrender of some charter-privilege. Nor would any act or resolution of the legislature declaring that the condition had happened upon which the taxing power might be exercised be conclusive of the fact and binding upon the company. The only effect such an act or resolution
81 could have, if any, would be to shift the burden of proof from the State to the company. But the question would still be a question of fact between the State and the company, to be determined, if disputed, as all other like questions are determined; that is, by resort to the judicial tribunals of the State.

The fourth cause of error assigned is that:

"The condition upon which the taxing power might lawfully be exercised over their subject not having yet happened, or not having been declared to have happened by legislative act or authority, your petitioner was not bound to make the return required by the 52nd section of the act of December 3d, 1863, providing for the assessment of taxes, and the act of the assessor of Marshall county, in charging and assessing your petitioner with taxes for want of such return, was unauthorized and void, in plain violation of the rights secured to your petitioner by its charter, and in contravention of the Constitution of the United States."

As to the question raised by this assignment of error, it has already been shown that the condition upon which the taxing power might be exercised had happened, and that no legislative declaration of the fact could be binding upon the company, so that there was no violation of the charter of the company in assessing and charging the taxes assessed, and charged as contended by the petitioner.

The fifth cause of error assigned is that:

"Before dissolving the injunction the court should have directed a reference to a commissioner, an issue to be heard by a jury, for the purpose of ascertaining whether the nett income of the road had exceeded the rate of six per centum per annum upon the capital invested in the State of Virginia, or West Virginia, prior to the first of February, 1864, or otherwise; and until a report or verdict in the affirmative, the said injunction should have been continued."

This assignment of error is based upon the supposition that the nett income of the road must exceed six per centum upon the capital invested in said road in this State, which, as has been before stated, is not the correct construction. There could have been no necessity for a reference, or an issue, to ascertain the nett income of the road, for that sufficiently appeared to the court from the facts in the case.

82 The sixth and last cause of error assigned is that:

"If the property and profits in the hands of your petitioner belonging to the stockholders of the company was liable to taxation at all, it was only liable under the seventh section of the act of March 6, 1847, to general taxation for State purposes, which might be equal and uniform, and was not liable to local taxation for county purposes, which might be special and therefore unequal and unjust; and so the said circuit court should at least have restrained the collection of the heavy levies for county purposes, made by the supervisors of said county, if it was rightfully dissolved as to the State and school taxes claimed on the part of the State."

The point raised in this assignment of error depends upon the meaning of the word general, as used in the seventh section of the act of 1847. It may be assumed that if the word general had not been used in the section there would be no difficulty about its meaning.

This section takes the place of that part of the 18th section of the original charter heretofore granted, so far as there is any disagreement between them.

That part of the 18th section of the original charter referred to, has been held by the court of appeals of the State of Maryland to exempt all the property of the company of every description from taxation. The mayor and city council of Baltimore vs. the Baltimore and Ohio Railroad Company, 6 Gill's Rep., 288.

It is not necessary now express any opinion in relation to this decision, as it can have no material bearing here, nor could it have if different from what it is.

But assuming that the exemption of the shares of the capital stock of the company from any tax may be construed to exempt the property of the company from taxation under the original charter, what is to be the effect of the act of 1847?

The words of the original charter are:

"The shares of the capital stock of the said company" shall be exempt from any tax; while the words of the act of 1847 are: "The

stock, property, and profits of said company shall be subject to general taxation."

Whatever may be the extent of the exemption from taxation under the original charter, it is plain that under the act of 1847, whenever a liability to taxation exists it extends to the property of
83 the company so far as the same may be or accrue within this State.

Nor does the word general, or the phrase general taxation, as used in the act, qualify the right of taxation, or limit it to a particular kind of taxation.

The petitioner claims such limitation, and that if it be liable to any taxation, it is only liable to general taxation for State purposes, and is not liable for local or county taxes.

The power to tax all property within a State for the support of government is a right existing in all governments and essential to their existence.

If the property in this cause were owned by a natural person upon the ordinary conditions of ownership, there could be no question as to its liability for the taxes imposed upon it. Providence Bank vs. Billings & Pittman, 4 Peters, 563.

The Baltimore and Ohio Railroad Company is an artificial person, invisible, intangible, but existing in contemplation of law. Being the mere creature of the law, it possesses only such powers as its charter confers upon it, either expressly or as incidental to its existence. Among the powers of the company, conferred by its charter, is that of purchasing and holding property for its necessary purposes. By virtue of the power conferred by its charter it does hold the property on which the taxes in this controversy are charged, and this property is just as much liable to taxation when owned by the company, an artificial person, as if owned by a natural person, unless it be exempt from taxation in whole or in part by the charter of the company.

Whenever the right to tax the property of the company exists at all, the right exists to tax it for the same purposes and to the extent that the same property might be taxed if it belonged to a private or natural person, unless this right is limited by the word general in the amended charter, as it is contended that it is. To give to the word its plain, literal signification, its meaning is exactly the reverse of that contended for. The definition of the word general, found in Burrill's Law Dictionary, is, "That which comprehends all; the whole as distinguished from special, which signifies something designed for a particular purpose."

84 There can be no good reason why the word shall not have its usual significance, and not be held to be a limitation on the taxing power.

In the case of the Sturbridge canal vs. Wheely and others, in 2 Barnwell & Adolphus, 793, it was held that, "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a

bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this : that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

In the case of the Philadelphia and Wilmington railroad vs. the State of Maryland, 10 Howard, 393, Chief Justice Taney, delivering the opinion of the court, uses this language: "This court on several occasions has held that the taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms."

In the case of the Ohio Life Insurance and Trust Company vs. Debolt, 16 Howard, 416, Chief Justice Taney uses the following language in delivering the opinion of the court: "The grant of privileges and exemptions to a corporation are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community has an interest in preserving undiminished will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken."

In the recent case of the Jefferson Branch Bank vs. Skelly, 1 Black, 436, Judge Wayne used the following language: "The rule of construction in such case is, that the grant of privileges and exemptions to a corporation is to be strictly construed against the corporation and in favor of the public; that nothing passes but what has been granted in clear and explicit terms; and that neither the right of
taxation nor any other power of sovereignty will be held by
85 this court to have been surrendered unless such surrender has
been expressed in terms too plain to be mistaken."

The principles announced in these cases are the well-settled rules of construction in the class of cases to which they apply, of which the case under consideration is one.

And if there remained any doubt as to the extent of the power of taxation when construed according to the literal import of the terms used when construed in the light of these rules of construction, there remains no doubt but what the property of the company, whenever liable to any taxation, is liable to all taxation, or to both State, county, and other local taxation for the same purposes and to the same extent that other property may be taxed, and that the right to assess the taxes assessed for county as well as for State purposes, and in dispute in this case, is not prohibited by the 7th section of the act of 1847 nor by any other provision in the charter of the company.

The court below did not for any of the causes assigned, or for any other apparent cause, commit any error in rendering the decree com-
plained of, and the same will have to be affirmed with dam-
86 ages and costs to the appellees.

87 I, the undersigned, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing is a full and complete copy of the record in the case of the Baltimore & Ohio Railroad Company vs. the supervisors of Marshall county, and Jackson Reed, sheriff of said county, as the same remains in my office.

Given under my hand and the seal of said court at the city of Wheeling, the 20th day of April, 1869.

[SEAL.] SYLVANUS W. HALL, *Clerk.*

IN ERROR

FROM THE

SUPREME COURT OF THE UNITED STATES

TO THE

SUPREME COURT of APPEALS of the STATE of W. VIRGINIA.

No. ~~468~~ 49

THE BALTIMORE & OHIO RAIL ROAD COMPANY

vs.

THE SUPERVISORS OF MARSHALL COUNTY, ET AL.

PLAINTIFFS IN ERROR'S BRIEF ON MOTION TO DISMISS.

IN ERROR

FROM THE

SUPREME COURT OF THE UNITED STATES

TO THE

SUPREME COURT of APPEALS of the STATE of W. VIRGINIA.

No. 468.

THE BALTIMORE & OHIO RAIL ROAD COMPANY

vs.

THE SUPERVISORS OF MARSHALL COUNTY, ET AL.

PLAINTIFFS IN ERROR'S BRIEF ON MOTION TO DISMISS.

This is a motion to dismiss for want of jurisdiction in the Supreme Court of the United States. The discussion involves a statement of the merits of the case so far as may be necessary to place this court in possession of the facts, out of which has arisen the present litigation.

The Baltimore and Ohio Rail Road Company was incorporated by the State of Maryland on the 28th February, 1827, "with all the rights and powers necessary to the construction and repair of a rail road from the City of Baltimore to some suitable point on the Ohio river," (section 14 of the Acts of Assembly of Maryland, of December Session, 1826, ch. 123,) and by the 18th section it was declared, "that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this Act, and their successors forever; and the *shares of the capital stock* of the said company shall be deemed

and considered personal estate, and shall be *exempt from the imposition of any tax or burthen*, by the States assenting to this law."

In the same year, on the 8th March, 1827, the Legislature of Virginia passed "An Act to conform a law passed at the present session of the General Assembly of Maryland, entitled 'An Act to incorporate the Baltimore and Ohio Rail Road Company,' passed March 8, 1827."

In this Act of Virginia, the Maryland Charter of the Plaintiffs in error was set forth *totidem verbis*, and it was enacted by the Legislature of Virginia *that the same rights and privileges* shall be and are hereby granted to the aforesaid company, within the territory of Virginia, as are granted to them within the territory of Maryland."

Then follow certain provisions touching the exercise of the powers of the Maryland corporation within the State of Virginia, which need not be noticed particularly at this time.

The Maryland Act had provided that if the "road shall not be commenced in two years from the passage of this act, and shall not be finished within this State in ten years from the time of the commencement thereof, then this Act shall be null and void."—*Section* 22 *of the Charter.*

No mention is made of the commencement or completion of the road in the Virginia act.

After the passage of the Virginia law, other laws were passed from time to time by the Virginia Legislature, relating to the Plaintiffs in Error. The work was the pioneer work in the United States; its route was difficult: its construction costly; and it halted at Cumberland, in Maryland, to which place it was opened in 1843, until, under an Act of Virginia, passed on the 6th March, 1847, it was finished to the Ohio River.

The 6th section of the Virginia Act of 1847, provided "that the Company (the Plaintiffs in Error) shall be subject to the provisions of the Act of Assembly (of Virginia) passed on the eleventh day of March, eighteen hundred and thirty-seven, establishing general regulations for the incorporation of Rail Road Companies, with respect to that portion of their road, or other improvements, now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable."

And the 7th section provided "that the stock, property and profits of the said company, so far as the same may be or are used within this Commonwealth, shall be subject to *general taxation*, in like manner and on the same footing with other similar companies within this State; *Provided, however*, that said taxing powers shall not be exercised until and unless the net income of

the said Baltimore and Ohio Rail Road shall exceed six per centum upon their capital invested."

These several acts of the State of Virginia, accepted by the Plaintiffs in error, created a contract which the State had a right to enter into, and which, without the assent of its co-contractor, it could not constitutionally violate.

New Jersey *vs.* Wilson, 7 Cranch, 164.

It will be seen from the above, that by the Charter of Maryland of February 28, 1827, and the law of Virginia of March 8th following, recognizing the Plaintiffs in error in that State, and authorizing the construction, there, of the Baltimore and Ohio Rail Road, "the shares of the capital stock" were declared to be "personal estate," and "exempted from the imposition of any tax or burthen;" and this exemption continued, unaffected by any intervening legislation of either State, until the passage of the Act above quoted of May 6th, 1847, accepted by the Plaintiffs in error, and binding upon them thereafter in the State of Virginia. The construction to be given to this Act will be, at a proper time, one of the main questions for consideration here.

Some years elapsed after the passage of the Act of 1847 before the road was completed; and, thereafter, there was a further interval, without any attempt to tax the property of the company, it not being pretended that the net income of the road authorized it; and so it continued until the creation of the separate State of West Virginia was followed by the legislation now in question.

In 1863, the Legislature of West Virginia passed a law, Dec. 3, 1863, entitled "An Act to provide for the assessment of Taxes"—providing for the election of Assessors—the making of land and personal assessments, for State taxation," which "should also serve for laying the county and township levies." The same law provided in its 52d and 53d sections that "The President, Secretary, or principal accounting officer of every Rail Road Company, whether deriving its corporate power exclusively from this State or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officer so listing, all the property, money and credits of said Company of whatever kind, wholly held or used in this State, and all other proportional value of all locomotives and rolling stock, passing in and out of this State, on rail roads crossing the lines thereof, to be ascertained by the proportion of miles now within this State by such locomotives or other rolling stock on the road belonging to such company or

any connecting line: the proportional value of all such locomotives and other rolling stock so ascertained to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other rail road within the State. *The property exempt from taxation by the Charter of any such company shall not be assessed.*" Then follow numerous details as to the execution of the law, not requiring notice at this time.

In 1864, Feb. 29, an act was passed fixing the rates of taxation on the property assessed; and, in 1868, March 5th, another act was passed reducing the rate previously adopted.

Under these acts of the Legislature of West Virginia, the assessor of one of the Districts of Marshall County, not regarding the Plaintiff in error as coming within the category of companies exempted from taxation, assessed on the revenue books of the County, property belonging to the Plaintiff in error, and valued at $315,000, and charged thereon for the State tax $945, and for the school tax $315; while the supervisors of the County levied on the amount of the assessment, $6,378.75, or, including the tax for schools, $8,505 for the year 1864. To prevent the collection by the Sheriff, Jackson Reed, of this sum on account of taxes which the Plaintiffs in error held they were exempted from by their charter from Maryland and the acts of Virginia, of 1827 and 1847, respectively, application was made to the Circuit Court of Marshall County for a writ of injunction restraining the Supervisors of Marshall County and the Sheriff thereof from proceeding to levy upon or distrain the property of the Plaintiff in error for the amount of said State, school and county taxes, or otherwise to collect the same, until the further order of the Court, and asking that a decree might be pronounced, declaring the property of the Plaintiff in error exempt from all taxation, and for further relief. (*See pp* 13–15 *of the Record.*)

The injunction was granted as prayed—(See p. 161)—answers were filed, (See pp. 18–23;) the bill and answers respectively were amended; there was a cross-bill involving the same questions, and praying a discovery; (pp. 23–25), a demurrer thereto which was overruled; (p. 27.) an answer was filed to the cross-bill; depositions were taken, and other proceedings held, not necessary to be detailed here, resulting in a decree of the Circuit Court, in which, after reciting what had been brought before it, the Circuit Court held (p. 35) that the Plaintiff in error was not entitled to the exemption claimed by it *either in relation to State or County taxation;* that the injunction should be dissolved, and the bill of the Plaintiff in error dismissed with costs.

The testimony (pp. 39–51) had relation mainly to the amount of net income of the Plaintiff in error, and was relied upon to shew that this, upon the portion of the road lying *in the State of Virginia*, and, after its creation, *in the State of West Virginia*, had never exceeded the rate of six per cent. per annum.

From the above decree an appeal was taken to the Supreme Court of Appeals of the State of West Virginia; and for cause of error in the same, it was assigned as follows—(pp. 9 and 10.)

"1st. The Baltimore & Ohio Railroad Company having been, by the act of the 6th of March, 1847, which was accepted by said company, declared subject in all respects to the act establishing general regulations for the incorporation of railroad companies, passed March 11th, 1837, and by the 23d section of the last named act, it being declared that the property and profits of a railroad company should be vested in the several stockholders thereof, in proportion to their respective shares, and declared to be personal estate. It follows that the property and profits of your petitioner (company) could only be assessed and charged with in the names of the several stockholders in whom the same was vested, in proportion to their respective shares, and could not be so assessed and charged in the name of the company on which said property and profits were not vested.

"2d. If the property and profits in possession of your petitioner for the benfit of the stockholders, who were the owners thereof under the law, could be at any time assessed and charged with taxes in the name of your petitioner, yet that under the 6th section of the act of March 6th, 1847, which created the only qualification to the total exemption from taxation granted by the original charter of the company, the taxing power thereby reserved was only to be exercised when and after the net income upon the capital invested in the State of Virginia, and after its creation in the State of West Virginia, should exceed the rate of six per centum per annum, and upon the pleadings and proofs in the cause, it is not made to appear that such nett income has exceeded tha rate of six per centum per annum upon the capital invested in said State; and so that the time has not yet arrived at which, nor has the condition happened upon which, the said taxing power could lawfully be exercied over the said property and profits.

"3. It is clear from the said act last referred to, that before the said taxing power was to be exercised, it was the intention of the Legislature that it should be first ascertained and declared, by act or resolution of that body, or by some other appropriate method under its authority, that the condition had happened

upon which the taxing power might lawfully be exercised; and it was not to be left to the local officer of any one of the counties through which the road passed to take upon himself the duty of determining that question. No such act or resolution was ever passed by the Legislature of Virginia, or by that of West Virginia, nor was it ever ascertained by any competent authority under either that the net profits of the road had reached the point at which taxation might commence.

"4th. The condition upon which the taxing power might lawfully be exercised over their subject not having yet happened, or not having been declared to have happened by legislative act or authority, your petitioner was not bound to make the return required by the 52d section of the act of December 3d, 1863, providing for the assessment of taxes; and the act of the assessor of Marshall county, in charging and assessing your petitioner with taxes for want of such return, was unauthorized and void, in plain violation of the rights secured to your petitioner by its charter, and in contravention of the Constitution of the United States.

"5th. Before dissolving the injunction the Court should have directed a reference to a commissioner, or an issue to be heard by a jury, for the purpose of ascertaining whether the net income of the road had exceeded the rate of six per centum per annum upon the capital invested in the State of Virginia, or West Virginia, prior to the 1st of February, 1864, or otherwise; and until a report or verdict in the affirmative, the said injunction should have been continued.

"6th. If the property and profits in the hands of your petitioner, belonging to the stockholders of the Company, was liable to taxation at all, it was only liable, under the 7th sec. of the act of March 6, 1847, to general taxation for State purposes, which might be equal and uniform, and was not liable to local taxation for county purposes, which might be special, and therefore unequal and unjust. And so the said Circuit Court should at least have restrained the collection of the heavy levies for county purposes, made by the supervisors of said county, if it was rightfully dissolved as to the State and school taxes, claimed on the part of the State."

The case came on to be heard before the Supreme Court of West Virginia, and was heard on the 29th and 30th July, 1868, and on the 25th January, 1869, the Court of Appeals pronounced the following decree—affirming the decree of the Circuit Court.

"The Baltimore and Ohio Rail Road Company, Appellant,
vs.
The Supervisors of Marshall County, and Jackson Reed, Sheriff of said County, Appellees."

"Upon an appeal from a decree of the Circuit Court of Marshall county, pronounced on the 9th day of April, 1867, in a cause in which the Appellant was Complainant and the Appellees were Defendants:

The Court having maturely considered the transcript of the record of the decree aforesaid, together with the argument of counsel thereupon, and it appearing from the record that the net income of the Baltimore and Ohio Rail Road, for the year 1864, the year for which the taxes in dispute were assessed, as well as for the preceding year, did exceed six per centum upon the capital invested in said road, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said decree. Therefore it is adjudged, ordered, and decreed, that the said decree be affirmed, and that the Appellant do pay to the Appellees damages according to law, and also their costs by them about their defence of the said appeal in this Court expended, which is ordered to be certified to the Circuit Court of Marshall county."

The reasons filed with the record will be found at pp. 54-62.

Without quoting them in full in this brief, it is sufficient for the present purpose to say, that, after referring to the facts here stated, and agreeing with the Plaintiff in error that the act of March 8th, 1827, recognizing it as a corporation in the State of Virginia, was not repealed by the act of March 6, 1847, the Court decide—

First.—In regard to the first cause of error assigned—"That the property belonging to the Company is vested in the shareholders *in their corporate capacity*, and not as *individuals or natural persons*, and *is consequently taxable in the name of the Company.*"

Second—With regard to the second cause of error assigned, the court held that the language of the act of 1847, in connection with the net income of the Company could not be limited to the portion of the road in the State of West Virginia, and that, even upon the assumption that it was so limited, the property of the company was subject to taxation at the time that it was taxed.

Third—Touching the third cause of error assigned, the court held that no act or resolution of the Legislature declaring the com-

pany's net income to exceed six per cent. was necessary to warrant the assessment of the taxes by the parties charged with that duty.

Fourth—The decision of the court on the last cause of error assigned, necessarily involved the overruling of the fourth cause of error, to wit: That until action by the Legislature the plaintiff in error was not bound to make the return required by the act of 1863, already quoted.

Fifth—The court dispose of the fifth cause of error by referring to what they had already decided in regard to the net income of the company, what they hold made a reference to a commissioner to ascertain the fact unnecessary.

Sixth—And in regard to the sixth asignment of error, drawing a distinction between *general* taxation for State purposes, and local taxation for county purposes, the court denied the distinction, and held that "whenever the right to tax the property of the company exists at all, it exists for the same purpose and to the extent that the same property might be taxed if it belonged to a private or natural person, unless this right is limited by the word "*general*" in the amended charter—which the court held was not the effect of the word; and that the right, therefore, "to assess for taxes, assessed for county as well as State purposes, was not prohibited by the 7th section of the act of 1847, nor by any other provision in the charter of the company."

Upon this decision, the Plaintiff in error—claiming an exemption from the taxation above referred to under the acts of the Legislature of Virginia of 1827 and 1847, creating a contract between it and the said State, which was impaired by subsequent legislation to which it had given no assent, and which was in violation of the Constitution of the United States—prayed and obtained the writ of error, which has placed the present case on the docket of this court.

And the question on the motion now made is, whether this court has jurisdiction in the premises.

The provision of the Constitution of the United States which is relied upon as sustaining the jurisdiction of the court is well known.

"No State shall pass any *ex post facto* law or law impairing the obligation of contracts."

And we are to enquire whether, upon the facts shown by the record, such a law has been passed by the State of West Virginia.

The plaintiff in error contends that the laws of 1863, 1864 and 1868 are such laws, so far as they subject the property of the plaintiff in error to taxation.

These laws having been sustained by the courts of the State, in a suit to which the plaintiff in error is a party, and the decision having been against the exemption claimed under the contract which it is contended they impair, and in favor of their validity, the case has arisen, provided for by the judiciary act, giving jurisdiction, in such event, to the Supreme Court of the United States.

It is evident, then, that there are but two matters to be inquired into in this connection, on the present motion:

First—Does it appear from the record that the plaintiff in error is a party to a contract with the State of Virginia, exempting its property from taxation.

Second—Does the Legislation of Virginia of 1863-4 and 8, impair such a contract, if it exists.

And there being no question as to the effect of this legislation, to subject the property referred to to taxation, the present enquiry resolves itself into the meaning and effect of the acts of 1827 and 1847, under which the exemption is claimed.

This, it is true, makes it necessary for this court to give a construction to the laws of a State where tribunals have already passed upon them.

But that this is within the jurisdiction of the Supreme Court in cases where the construction given by the State court raises the question whether the Legislature complained of is not in violation of a contract, has, it is submitted, been already decided.

See the Jefferson Bank *vs.* Skelly, 1 Black, 436.

The Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116.

Binghampton Bridge, 3 Wallace, 51.

Nor can it make any difference here whether the law creating the contract, or the law alleged to be in violation of it, is the law to be construed by this tribunal.

It is the question of antagonism, alone, which is important. It is the conflict between the two that gives jurisdiction to the Supreme Court, when such conflict is the result of the construction given to either by the State Court.

Turning, then, to the laws creating the contract alleged to be violated, the plaintiff in error contends:

First—That the State of Virginia's right to tax under any circumstances, is confined to the shares of the stockholders, and cannot be enforced against the property of the company; and that the contract to this effect is violated by the act of 1863, and the proceedings under it.

Second.—That the State's right to tax had reference to the net profits of that portion of the road only, lying within the State of West Virginia; and that the law which makes the net profits or income of the entire work the standard, violates the contract between the State and the company.

Third.—That the Act of 1863, which requires the assessor to assess the value of the property within his district, before the Legislature has determined that the contingency has arisen which alone can justify an assessment, violates the contract, which, it is contended, gives, when properly construed, this protection to the Plaintiff in error against the ignorance or caprice of local officers.

Fourth.—That the net profits of that portion of the road lying within the State of West Virginia not having reached six per cent. per annum, the assessment under the Act of 1863, and consequently the Act that authorized it, is, to that extent, in violation of the contract between the State and the Company.

Fifth.—That the Act which authorizes the local assessment, without enquiry having been previously had to ascertain what the net income actually was, so far violated the contract in question that it deprived the company of a protection to which it was entitled, and made the State, through its agent the assessor, the judge in its own case.

Sixth.—That by the language of the Act of 1847, "the stock, property and profits of said company shall be subject to general taxation," which the Plaintiff in error contends gives to the State the right to tax, in a certain event, for its own purposes only; and that without the authority to tax for any other, it could not delegate what it did not possess; and that the laws referred to under which assessments and levies for local purposes have been made, are to that extent in violation of the contract, properly construed, between the State and the Plaintiffs in error.

All the questions here suggested will come before the Court and will be proper for discussion when the case comes up in its turn

upon the docket; and there is no purpose of arguing them in the present brief. They are stated, and the brief is made as full as it is, only that the court may see that if any one of them can be sustained, there can be no question as to the jurisdiction of the Supreme Court in the premises.

If it is contended, and the court should so hold, that because a State Court has given its construction to a Statute, therefore this court cannot review the decision where it is alleged that one of its consequences is the violation of a contract, then, of course, there may be a ground for the present motion. But it is shewn by the decisions referred to, that this is not law; and it is insisted that the motion to dismiss must be overruled, and the Defendants in Error referred to the hearing of the case in its regular order for an opportunity of shewing, if they can, that the propositions here stated are untenable, and that the property of the Plaintiff in Error is liable under the acts complained of to assessment and levy.

JOHN H. B. LATROBE,
GEORGE H. LEE,
J. RANDOLPH TUCKER,
For Plaintiff in Error.

IN ERROR

FROM THE

SUPREME COURT OF THE UNITED STATES

TO THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Baltimore & Ohio Railroad Co.

VERSUS

SUPERVISORS OF MARSHALL COUNTY, ET AL.

49

SUPPLEMENTAL BRIEF AND ARGUMENT

OF

PLAINTIFF IN ERROR.

IN ERROR

FROM THE

SUPREME COURT OF THE UNITED STATES

TO THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Baltimore & Ohio Railroad Co.

VERSUS

SUPERVISORS OF MARSHALL COUNTY, ET AL.

SUPPLEMENTAL BRIEF AND ARGUMENT

OF

PLAINTIFF IN ERROR.

Referring to the brief filed on the motion to dismiss for the facts of this case and the nature of the controversy, it is proposed in this paper to state the points relied on for the reversal of the decree of the Court of Appeals, with some of the argument and authorities in support thereof.

It may be proper to premise that there is now no controversy between the State of West Virginia and the Baltimore and Ohio Railroad Company on the subject of taxation. Under a joint resolution of the two Houses of the Legislature of that State, passed on the 4th of March, 1869, a compromise was made between the State and the Company, by which an agreed amount was to be received from the Company in full of all taxes claimed to be due the State up to December, 31, 1868, and that amount has been paid into the Treasury. No controversy

has arisen since between the State and the Company concerning the taxes levied for State purposes, and the only controversy left in this case is as to the liability of the Company to county and other local taxation,—the county of Marshall affirming the liability under the laws applicable to this Company, and claiming to enforce against it the county levies and charges in the bill specified, and the Company claiming absolute exemption from county or other local taxation, and especially denying the validity of the particular county charges sought to be enforced by the county of Marshall. So that the only questions remaining in this case are whether, whatever might be the decision as to State taxation, the Baltimore and Ohio Railroad Company is liable, under the laws of the State applying to it, to county and other local taxation, and whether it was liable to the taxes imposed by the county of Marshall for local county purposes for the year 1864.

The appellant relies on the good faith of the State. Her engagements, as well as those of the State of Virginia to which she has succeeded, will be observed by every department of her government according to their just import and fair meaning. They will neither be eluded nor enlarged by a strained construction of language, but they will be fulfilled in the very sense in which they were tendered and accepted. It is only necessary, therefore, to this case, to ascertain the true meaning and effect of the statutes which relate to the subject of controversy.

It will not be claimed for the plaintiff in error that the essential and eminent right of the Sovereign Power to impose taxes for the support of Government can ever be lost by the incautious use of doubtful phrases in a legislative grant to a corporation. But a partial restraint upon the exercise of the taxing power may often be fully compensated by public benefits, and it has not been unusual for States to make such concessions. They are frequently made with perfect deliberation for the real or supposed advantage of the State itself. In some cases the plain purpose of the law-making power would favor and require a liberal construction of its grants, but in all cases a fair, just and reasonable interpretation should be applied.

The defendant in error, the county of Marshall, is not a Sovereign Power, but a municipal corporation, whose power and authority are strictly defined by law. Her power to tax is not to be enlarged by a doubtful construction of language in a statute. It is submitted that the claim of such a corporation to impose taxes must be sustained by as clear a demonstration of the legislative intent as would be required to sustain an exemption from taxation by the Sovereign Power. "Especially is the power of taxation, when granted to a subordinate body, to be strictly construed."

Per Samuels, J., in City of Richmond *vs.* Daniel, 14 Gratt., 387.

POINTS, &c.

1. The Maryland Act of the 28th of February, 1827, adopted and confirmed so far as the powers thereby granted were to be exercised within the limits of the State of Virginia, by the Virginia Act of the 8th of March, 1827, remained in force as the law of the Company's being in West Virginia, except so far as it had been modified by subsequent legislation, valid and binding upon the Company, of the State of Virginia or that of West Virginia, and consequently that the exemption from taxation contained in the Maryland law remained in force until the same was altered by the General Assembly of Virginia, with the consent of the Company.

The clause of exemption in the Maryland Act is found at the end of section 18, and is in these words:

"And the shares of the capital stock of said Company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States* assenting to this law."

It is true it is provided, (sec. 22) that, "if this road shall not be commenced in two years from the passage of this act, and shall not be finished within this State in ten years from the time of the commencement thereof, then this act shall be null and void." But no mention is made of the commencement or

* The reference here is to the States of Maryland, Virginia and Pennsylvania, as when the Road was first projected it was expected to pass through the territory of Pennsylvania, as well as that of Virginia, on its route to the Ohio river.

completion of the road in the Virginia act, and it may be doubted whether any similar condition is to be considered as attached to the legislation of Virginia. There could be no reason why the General Assembly of that State would make its grant dependent upon the time of the commencement or completion of the road in other States, and no purpose of its act was to be promoted thereby. But, concede that this condition is to be considered as adhering to the Virginia act, and that it was not performed. Still a clause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally. There must be a judicial ascertainment of the fact, and a judgment of forfeiture pronounced in a proper proceeding; and the Government alone can institute such a proceeding, as it may waive the breach of a compact made with it as well as an individual. And such waiver is sufficiently implied from subsequent acts of the Legislature recognizing the continued existence of the corporation.

Rex vs. Carmarthen, 1 Wm. Black, 187.
Rex vs. Pasmore, 3 T. R., 244.
Terrett vs. Taylor, 9 Cranch, 51.
2 *Kent's Comm.*, 313.
Angell & Ames on Corp., ch. 22, sec. 777.

It is not pretended that any proceeding was ever instituted to declare a forfeiture of the privileges conferred by the act of 1827, whilst it is plain that the subsequent legislatiou of Virginia distinctly recognizes the continued existence of those privileges, and particularly the exemption from taxation until the act conferriug it should be altered by the General Assembly with the consent of the company.

In 1837 an act was passed authorizing the Board of Public Works, on certain conditions, to subscribe $302,100 to the stock of this company, and providing that "if the company accept the subscription," it shall be subject to the general railroad law of 1837 as to carrying the mails and its "stock, property, and profits shall be subject to taxation so far as the jurisdiction of this Commonwealth extends, anything in the act of March 8,

1827 to the contrary notwithstanding. (Sess. act, 1836–7, p. 131, sec. 7.)

The same provision was contained in the act of 1838, which authorized, on certain conditions, another subscription of $1,058,420. (Sess. act, 1837–8, p. 114, sec. 5.) This act was amended in 1839 by relaxing the conditions of subscription. (Acts 1838–9, p. 68.) The last named act was passed after the expiration of the time limited (if any was limited) in the act of 1827 for completing the road. But these acts of 1837, 1838 and 1839, recognized the company as an existing corporation. None of them purported to change the exemption from taxation (which they assumed to exist,) unless the company should accept the subscriptions tendered, but the act of 1838 extended the time for completing the road till 1843.

It does not appear that either of the subscriptions thus offered was ever accepted. On the contrary, the subsequent legislation shows that neither of them was ever consummated, and probably that the Board of Public (Works) never offered to make them. But even if they had been made and accepted it appears that they were afterwards retracted by the State, and at the same time the liability to taxation which had been annexed to them was superseded.

In 1845 the General Assembly passed an act, which was to have no effect unless accepted within six months. (Acts 1844–5, p. 69.) It does not appear that this act was ever accepted, but on the contrary it is to be inferred from the act of 1846, that it was not accepted, for by that act more favorable terms were offered. (Acts 1846–7, p. 88.) So it is to be inferred that the latter act was not acceptable and the Legislature tendered still more favorable terms by the act of March 6, 1847, which was accepted by the company.

The act of 1845 provided "that nothing in this act contained shall be so construed as to entitle the said company to any subscription on the part of the Commonwealth to the stock of said company, nor to the subscription or any part thereof, on the part of the Commonwealth to the stock of said company, provided for in the several acts passed March 28, 1837 and April 2, 1838, concerning the said company which said provisions in

said acts are no longer in force or of any effect." This provision was not touched by the act of 1846, and was repeated almost literally in the act of 1847, at sec. 3.

According to any just rule of construction, this enactment, whenever it took effect, repealed the clauses in the acts of 1837 and 1838 subjecting the company to taxation, for the liability to taxation was expressly made to depend upon the acceptance of the subscriptions, which were repealed. Such must have been the understanding and intention of the Legislature, because they always joined with the annulment of those subscriptions a new and distinct provision on the subject of taxation. In the act of 1845–6, sec. 6, it was declared that the stock, property and profits of the said company, so far as the same may be or accrue within this State, shall be subject to general taxation in like manner with other similar companies. In the act of 1846, which offered better terms in other respects also to the company, it was provided in sec. 3 that the taxing power reserved in the sixth section of the act of the 19th of February, 1845, shall not be exercised until and unless the net income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum. Finally, in the act of 1847, which was accepted by the company, it was enacted (sec. 7) that the "stock, property and profits of said company, so far as the same may be or accrue within this Commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this State: Provided, however, that said taxing power shall not be exercised until and unless the net income of the Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested."

It was the evident design of this act to cover tho whole ground of legislation on this subject of taxing the company by modifying to a certain extent an exemption which until then existed in full force under the original act of 1827. Why declare that the company should be subject to taxation, provided it accepted the provisions of that act, if it were already so liable? In 1845 and 1846, and again in 1847, the Legislature manifested a sedulous care to subject the company to taxation in offering terms for its acceptance. Surely this was superfluous and

unnecessary if the company was already so liable. The time limited in the act of 1838 for completing the road had expired. The General Assembly was willing to grant a further extension, but embraced the occasion to impose new obligations. In 1845 it required, as a condition of the grant proposed, that the company should submit to taxation in like mannor with other similar companies. This absolute subjection to taxation appearing too onerous, the Legislature in 1846 consented that the taxing power should not be exercised until the net income should exceed six per centum. These provisions were united in the act of 1847, and were finally accepted.

Until the year 1837, as will be hereafter shown, it had been the policy of Virginia to encourage the then novel and hazardous enterprises of railroad construction, by granting exemption from taxation. After that period another policy was adopted, but the State did not deem it expedient or just to withhold the old endowments of exemption from taxation without substituting an equivalent in the form of subscriptions to stock. See act 1836–7, pp. 115, 117, 128, 129, &c. Accordingly, in 1837, and again in 1838, this company, like certain domestic corporations, was offered a subscription to its stock, with the condition annexed that acceptance of the subscriptien should operate as a release of the exemption from taxation. In 1845 the Legislature, in proposing to annul the previous offer of subscription on granting non-privilege, justly considered that the exemption from taxation would be thereby restored, if it had ever been relinquished ; and as it was neither desired to concede a total exemption nor yet thought proper to impose an unlimited liability to taxation, a modified liability was proposed. When, therefore, it was proposed that if the company accepted this act, it should become "subject to general taxation, in like manner with other similar companies," it certainly could not have been intended that the company should also be subject to still more unlimited taxation under the acts of 1837 and 1838. Still less could that have been contemplated when the General Assembly assented to additional restrictions on the power of taxation in 1846 and 1847. It seems clear that the affirmative of a limited and well-defined liability to taxation excludes the idea of any greater or

other liability to indefinite taxation. Such is the fair effect of the act of 1847 considered by itself, without reference to the previous legislation on the subject, but a review of the previous acts would seem to place it beyond a doubt; and it is submitted that the necessary operation of this act was to leave the company exempt from taxation as completely as it had ever been, except only so it was made liable to taxation by the express terms of that act.

That the original charter of the company, granted in 1827, continued to be the law of its being, except so far as it was modified by subsequent laws binding upon the company, is plainly to be adduced from decisions of the Supreme Courts of Appeals of Virginia and West Virginia.

B. & O. R. R. Co. vs. Gallahne's admr., 12 Gratt. 655.

Same vs. Supervisors, &c., to be reported in 4 West Virginia Reports.

2. The exemption of the "shares of the capital stock" of the company from taxation, found in the original charter of 1827, was in effect an exemption of all the property of the company of every description, and extended to county and other local municipal taxes, as well as those imposed by the State for general State purposes.

Although internal improvements by railroads had been the subject of consideration by the Board of Public Works of Virginia at an earlier period, it is believed that the first mention of a railroad in the legislation of that State was in the act of 8 March, 1827, above cited, confirming the Maryland charter of this company for the State of Virginia. (Acts 1826–7, p. 77.) This charter, as we have seen, contained an exemption from taxation. During the next ten years the General Assembly granted charters in regular form to many domestic railroad corporations, and each contained a similar exemption, except, perhaps, the one first granted in 1828, in which the exemption was omitted; but this omission was supplied by an amendment in 1829, which embraced the exemption. (Acts 1827-28, p. 59; 1828-29, p. 90.) This example was followed in all the railway

charters granted, until the enactment of the general railroad law of 1837. The usual clause was to this effect:

"All machines, wagons, vehicles and carriages purchased as aforesaid with the funds of the Company, and all their works constructed under the authority of this Act, and all profits which shall accrue from the same, shall be vested in the respective shareholders of the Company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatever." (See Acts of 1828-29, p. 90, sec. 15; 1829-30, p. 65, sec. 17; 1830-31, pp. 174, 184, 193; 1831-32, pp. 117, 125, 133, 141, 150, 158; 1832-33, pp. 80, 81; 1833-4, p. 135; 1834-5, pp. 96, 104, 115; 1835-6, pp. 130, 138, 145, 154, 164.

It thus appears that during a period of ten years, commencing with the grant to the Baltimore and Ohio Railroad Company, in 1827, it was the uniform policy of the State to encourage those novel, expensive, and hazardous, but useful enterprises by the peculiar immunity of exemption from taxation. After this time the policy was changed by substituting for this exemption subscriptions by the State to the stock of the companies.

The language of the Maryland Act incorporating this Company was nearly the same with reference to the character of its estate and exemption from taxation as that which Virginia employed in the Act creating such companies prior to 1837, touching the same subject. It was "that the said road or roads, with all their works, improvements, and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this Act, and their successors forever; and the shares of the capital stock of said Company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law. (Acts 1826-7, p. 83.) The Virginia Act recited the Maryland charter containing this clause *totidem verbis*, and enacted "that the same rights and privileges shall be, and are hereby granted to the aforesaid company within the territory of Virginia as are granted to them within the territory of Maryland,"—with certain exceptions and restrictions not relevant to this cause.

It cannot be doubted that the Legislatures both of Maryland and Virginia in these acts intended to confer a liberal endowment upon the Baltimore and Ohio Railroad Company by exempting it from all taxation. The enterprise was novel. It was the pioneer work of the kind in the United States. The route was difficult, and the cost of its construction would necessarily be very heavy. But it promised benefits and advantages to both States beyond computation, and it was deemed the policy of both to encourage it by the most liberal concessions.

In the case of *Mayor, &c., vs. B. & O. R. R. Co.*, 6 Gill, 296, the Court of Appeals of Maryland said: "the design contemplated by the Legislature in the insertion of this clause of exemption in the act of Assembly was to confer a certain substantial, not a nominal, benefit on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise. To impute to the Legislature an intention to exempt the shares of the stock from taxation, and at the same time to reserve the right to tax everything which constituted it a stock and gave to it its value, would be gratuitously to cast an imputation upon the Legislature inconsistent with every principle of judicial courtesy. If, as has been contended, the Legislature designed to retain the right of taxation upon the property of the company other than its franchise, it would have expressed the intention in terms, about which there would have been no controversy: it would have limited its immunity to the franchise only, not to the shares of stock which embrace every species of property owned by the company.

"The effort made to restrict the community now under consideration to State taxes only, cannot be sustained. The terms used in its grant are so broad, unambiguous and universal, and the reasons for making them so accordant therewith, that their full and natural import must be given to them. The exemption covers county and city as well as state taxes. There are no words used by the Legislature qualifying or limiting the extent of the immunity conferred."

In another case in the same Court the construction of the clause exempting the "shares of the capital stock" of this company became the subject of consideration, and the Court held

that its effect was to exempt the property of the company of every description from taxation.

Tax Cases 12 Gill & John, 117.

See also *Rome Railway Co. vs. Rome*, 14 Ga. 275.

The exemption is "from the imposition of any tax or burthen." Language could not be more comprehensive of all taxation falling under the authority of the State, whether general or local. It would impugn the good faith of the Commonwealth to suppose that she reserved the right to authorize taxes to be imposed by counties or municipal corporations, when her language imported that she had pledged herself to exempt the Company from "any tax or burthen." It would be contrary to the general scope of the policy adopted by her at that time, as hereinbefore shown, and it would be unreasonable, because contrary to all equitable principles of taxation.

In some of the States railroads are regarded as public works, established as great thoroughfares by public authority for the benefit of the public, the use of which being secured to the whole community, constitutes, like a canal or highway, a public easement, and it is held that the works incident to such public easement are public works, and as such exempted from taxation. And it is decided that the exemption extended to local taxes.

Inhabitants of Worcester vs. West R. R. Corp., 4 *Metc.* 564.

And the same priciple is affirmed in a case in Pennsylvania.

Railroad Company vs. Berks Co., 6 Barr, 70.

We conclude, therefore, that the exemption of the capital stock of a railroad company from taxation must be construed to be an exemption of all the property of the company, unless specially restricted otherwise; and that a statute granting an exemption from taxation in general terms, should be construed as an exemption from taxation by local municipal bodies subordinate to the State which grants the exception, unless a different purpose be indicated by the terms of the grant. A municipal or other local tax imposed under the authority of the State would contravene the exemption as flagrantly as a tax

imposed directly by the State itself. What the latter could not do, it could not authorize a local municipal authority to do. Otherwise an exemption purporting to be universal might fail to reach the most unreasonable and oppressive part of the burden.

It may be supposed that this conclusion is in conflict with the decision of the Court of Appeals of Maryland, in the case of *Gordon's Ex'rs vs. Mayor, &c.*, of Baltimore, 5 Gill, 231. But it will be found that that decision has no application to the question involved in this case. In that case the corporation interested was a bank situate within the city of Baltimore by which the tax in question was imposed. The bank being already subject to a State tax, the State stipulated not to impose any further tax. Plainly, therefore, the tax from which exemption was granted was an additional State tax to that already imposed. The court said, "under the circumstances of this case, the words 'further tax' have no application to the city of Baltimore." The circumstances thus alluded to, and the peculiar phrase "further tax" have no place in the present case.

3. The taxing power resumed and acquired by the State by the act of March 6, 1847, on its acceptance by the company, was confined to *general* taxation by the sovereign legislative power for general State purposes, and did not extend to taxation by counties, cities, or other local municipal authorities.

The seventh section of this act is as follows:

"*Be it further enacted*, That the stock, property and profits of said company, so far as the same may be or accrue within this commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this State; *provided, however*, that said taxing power shall not be exercised until and unless the net income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested."

If we have succeeded in showing that the exemption from taxation contained in the original charter of the company continued in force with the other provisions of the same until this act was accepted by the company, we are brought to the inquiry, in what manner and to what extent was that exemption with-

drawn or modified by the said act of 1847. In other words, we have to consider what is the liability that the act of 1847 actually and affirmatively imposes.

The liability declared is not simply to *taxation*. It is not said the company shall be subject to taxation by the taxing powers of the State. It is that it shall be subject to "general taxation," and this is to be "in like manner and on the same footing with other similar companies within the State."

What do these terms import when construed by their intrinsic force and meaning, and in the light of the antecedent and surrounding circumstances?

That it was the intention of the legislature to exempt the company from special, peculiar or invidious taxation is clear; and the term "general," with the reference to the other companies was employed to protect it against all kinds of taxation that might be unequal, and therefore would be unjust.

If the provisions of the act of 1827 were still in force, except so far as altered by the legislature, the provision in the act of 1847 subjecting the company to "general taxation" is to be regarded as an abridgement of an existing privilege. The privilege remains, except so far as it is taken away by the proper force of the terms employed to abridge it. When it is said that the property, &c., shall be subject to *general taxation*, the necessary implication is that it shall remain exempt from all other taxation. If the qualifying term "general" excludes all local taxation, the company must remain forever exempt from county, city, or other local municipal taxes, and the exemption, as we have seen, includes all its property. And that such was the intention of the legislature may fairly be deduced from the history and policy of its legislation in reference to this and other railroads within the State, as well as from a consideration of the nature of the subject and the fair and just principles of taxation applicable to it.

Railroads are constructed by public permission with private means, for a double purpose, public utility and private emolument. As long as they pay no dividends from their earnings, the public purpose only is subserved, and as we have seen, in some of the States they are regarded as public easements, and

the works necessarily incident to them are regarded as public works, and not a proper subject of taxation. It is only when a remunerative profit is derived to the stockholder in dividends exceeding the ordinary rate of interest on loans that they can be regarded as property liable to be taxed, and then on fair and just principles only. This was plainly the view of the legislature of Virginia in offering the act of 1847 to the acceptance of the company. Here was a road proposed to be constructed by private enterprize, extending from the head of the Chesapeake Bay to some point within her limits on the Ohio river, running for more than two-thirds of its entire length within her territory, and traversing some dozen different counties of the State. It promised immense benefits to her and her people in opening the country and developing its resources, and thus increasing her trade and commerce, her wealth and population. It was to be expected that she would give all possible encouragement to the enterprise, and as we have seen, when it was first projected, and her sanction given to it, she granted to the company absolute exemption from all taxes and burthens whatever. The increase of her revenue from the increase of the population and wealth which the road would create was perhaps deemed a sufficiently fair equivalent. In 1837, though still willing and desirous that the road should be constructed, yet her policy and views had undergone some change. She offered to make a subscription to the stock on certain conditions, one of which was that the company should be subject to taxation. In 1838 another and larger subscription was tendered on certain conditions, including liability to taxation. These conditions being deemed too onerous, the act was amended in 1839, and the conditions relaxed. Neither of these acts was accepted, and in 1845 the road was still winding its slow length along and yet unfinished. By this time the policy of the legislature had undergone another change, and in that year an act was passed by which the offers of subscription were withdrawn, but leave was given to the company to complete their road, on certain conditions; one of which was, that the stock, &c., should be subject to *general* taxation, in like manner with other similar companies. By an act passed in the following year, it was provided "that the taxing

power" (reserved in the act of 1845,) "shall not be exercised until and unless the nett income shall exceed six per centum per annum." And neither of these acts having been accepted, finally, in 1847, an act was passed which was accepted by the company, by which it was provided (§ 7) "that the stock, property and profits of said company, so far as the same may be or accrue within this Commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this State; provided, however, that said taxing power shall not be exercised until and unless the net income of the company shall exceed six per centum upon their capital invested.

The difference in the language of this act which was accepted from that employed in the previous acts of 1837 and 1838, that were rejected, is notable, and cannot fail to strike attention.

By the acts of 1837 and 1838 the character and limits of the taxation to which the company was to be subject were in no manner defined, nor was the manner in which it was to be enforced prescribed. It was the regular and ordinary taxation to which all property holders in the State were subject and assessed in the same manner as other taxes were assessed. By the act of 1847, (uniting and amplifying the provisions of the acts of 1845 and 1846,) the taxation was to be *general taxation, in like manner and on the same footing* with other similar companies within the State, and only to be exercised when the net profits exceeded six per cent. The particular terms employed were not without distinct import and meaning. They must be interpreted in the light of the antecedent and existing legislation of the State. Considering the intrinsic nature of the subject proposed to be taxed, the total exemption from taxation which had been originally granted to the company, the subsequent withdrawal of the subscriptions on the part of the State, the magnitude and difficulty of the enterprise, the great importance of the improvement to the State, and particularly to that portion thereof through which the road passed, and its general policy towards similar works within the State, the Legislature plainly contemplated a modified and restricted taxation to which the company was to be subjected. And this would be in

accordance with justice and sound principle. An equitable principle of taxation must have constant reference, though it may not observe an invariable proportion to the ability of the taxpayer, as indicated by the value of the subject. But the law for public as well as private ends devotes all the property of a railway company to a peculiar and perpetual use. It is not held for sale or barter or for ordinary uses other than those of the particular business to which it is dedicated. Whilst it remains as it is designed forever to remain, in the use of the road a peculiar character is impressed upon it, and such a connection is established by a sort of necessity between all the different elements of which it consists that the value of any single parcel of the property depends on the condition of all the rest, and upon the net result of the operations of the company. The total value of all the property of the company, including its franchises, may be represented by the value of the stock. This is indicated with greater or less accuracy by the dividends, or it may be approximately estimated from the amount of freighting business done on the road, or the number of passengers transported, or both combined. Generally, if there be no dividends, the road is fulfilling one of the purposes of its creation—the accommodation of the public—and is of no value as private property. As a mere instrument of public accommodation it should not be regarded as a proper subject of taxation by the public. But when its operations result in a dividend, it may become, to the extent of the dividend, liable to taxation as private property held for private profit.

Accordingly, when the act of 1847 passed, the mode of taxing railroad companies in Virginia was to exact a certain rate upon the dividends declared. (Acts 1842–3, ch. 2, p. 7; acts 1856–7, p. 7, sec. 5.) Under this system stock held by *bona fide* nonresidents was not taxable. (Acts 1842–3, p. 10, section 12; 1845–6, p. 7, sec. 5. Code of 1849, p. 213.) By the act of March 18, 1856, railroad companies were permitted to pay one mill per mile for every passenger transported, in lieu of all taxes on its bonds, buildings and aquipments; and by an act passed on the 30th of March, 1860, this rate was extended so as to include in addition one-half of one per cent. of the gross amount

of freight received, and payment of one mill per mile on passengers; and one-half of one per cent. of freight was receivable in lieu of all taxes whatever on their property. These duties in discharge of all taxes were paid into the State Treasnry for the general purposes of the State, and no part was designed or appropriated for the benefit of any county or local municpality through which the road happened to pass. The system of taxation established, in either alternative is wholly inconsistent with, and utterly excluded the idea of any local taxation whatever.

The considerations of justice and propriety above presented, would seem to repel the presumption in any case that mere local taxation upon the property of a railroad company has been authorized. The works of such a company rarely, if ever, lie within a single local jurisdiction. They often extend over hundreds of miles and through several States. This road is but little short of four hundred miles in length, and traverses two States. The part of the company's property situated in a single county might be a very small fraction of the whole, and its separate value could not be fairly estimated, whilst it remains devoted to the peculiar uses of the whole road. No local taxation could be reasonable or equitable unless, like the general taxation for State purposes, it rests upon some basis having a just relation to all the property and operations of the company. If a county or other local municipality is to derive revenue from such a source, it must be by some method of taxing the stock held by citizens of the local jurisdiction, or the profits after they have passed into their hands.

The two methods of taxation adopted in Virginia, above alluded to, sufficiently illlustrate the principle of general taxation applicable alike to all railroad corporations, whether they operate wholly or but partly within the State. And it is believed that the affirmative language of the act of 1847 is insufficient to subject the Baltimore and Ohio Railroad Company to any species of taxation which is not, in like manner, applicable in its nature and applied in point of fact to all other similar companies in the State. To meet this condition the tax must be imposed by the Legislative authority of the State itself,

and not a mere local municipality, which can partially tax only one or a small number at most of similar companies. If the State, in its imposition of taxes, could maintain that equality contemplated by the act between the different companies within the State, it surely would be destroyed by permitting a local body to impose an additonal tax on one, which could not also reach the property of others.

In this connection the arbitrary and extraordinary mode in which the value of the property of a railroad is to be ascertained for the purposes of taxation by the act of 1863, is worthy of consideration. If the road runs partly within and partly without the State, the value of the locomotives and other rolling stock, (constituting a large portion of the property of such a company,) is to be ascertained by the proportion which the number of miles run within the State bears to the whole number of miles run over the road of such company, or any connecting line, and this proportional value is to be assessed as the property of the company subject to taxation, whether it be run upon its own road or any other railroad within this State. So with reference to the distribution of the gross value of the property of such a company amongst the different counties through which the road passes. The act provides (§ 52,) that the proportional value of all locomotives and other rolling stock, and the value of all other personal and moveable property, money and credits, shall be added to the stationary and fixed property and real estate, and shall be apportioned to each county through which the road passes *pro rata*, in proportion to the fixed property and real estate belonging to the company in such county. Thus the total value of the locomotives and other rolling stock is ascertained by an arbitrary and impracticable rule, unknown in Virginia at the time of the passage of the act of 1847, and never since, so far as known, applied in that State to any of the railroads referred to in said act as to furnish the rule and method of taxation of the Baltimore and Ohio Railroad Company when it should become liable to taxation. And this total value is to be distributed amongst the different counties for purposes of taxation by a rule equally arbitrary and impracticable, and which gives to some of the counties a portion of the value of property

never at any time within their limits. Surely such a method of taxation could never have been contemplated by the act of 1847.

It is submitted, therefore, that both by the terms and spirit of this law, local taxation, to be worked out in such method and leading to such results, is forever excluded.

4. That the act of 1847 provided for the exercise of the taxing power, thereby reserved only on the happening of a certain contingency, and contemplated further legislative action, declaring that the contingency had happened upon which that power was to be exercised and taxes imposed on the Baltimore and Ohio Railroad Company.

The language of the act is, "that the taxing power shall not be exercised until and unless the net income of the Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested." The necessary implication is that the profits of the road had not, up to that time, exceeded the prescribed limit, (a fact sufficiently self-evident,) and that the company was not then subject to taxation. By whom and when was the "taxing power" to be "exercised?" It could scarcely have been contemplated that a mere local assessor in any county through which the road passed could, at his mere will and pleasure, undertake to determine the grave and important question of the happening of the contingency on which the liability to taxation accrued. Under the general assessment law, the assessor, (styled in Virginia commissioner of the revenue,) might as properly have undertaken to assess the property of this company for taxation in 1848, upon strength of his judgment that the profits did exceed the prescribed rate, and that the company was therefore liable to taxation, as the assessor of West Virginia did in 1864, under the act of 1863. Neither the General Assembly of Virginia nor the legislature of West Virginia had, by any act, resolution, or other legislative action whatever, declared that the profits of the company had exceeded the prescribed rate in any year or years, or that the company had become liable to taxation, or that its property should be assessed. The former had, in effect, declared that in 1847 it was not liable to taxation, and the latter had, in the act of 1863, under which the assessment in this case was made by the asses-

sor of Marshall county, expressly declared and directed that the property of a railroad company exempt from taxation by its charter should not be asssessed, (acts 1863, p. 163, § 52); and there had been no intermediate legislation between those periods declaring this company liable to taxation expressly or impliedly. The legislature has always had the means of determining whether the company was liable to taxation under the act of 1847 or not. By the act of 1837, to which this company was made subject on accepting the act of 1847, the company is required to make regular reports to the Board of Public Works, showing, amongst other things, the whole amount of the capital stock, the amount of tolls received, and the net loss or profit for each year; (acts 1836–7, ch. 118, § 27, p. 111.) And by sec. 28 it is required to publish a notice of every dividend declared in certain newspapers therein prescribed. If the company failed to return or publish the true amount of its profits and dividends, unquestionably the legislature could make investigation into the fact, and if satisfied that the net income had exceeded the prescribed rate, could, by a proper act or resolution, declare that the company had become liable to taxation under the terms of the act of 1847, and direct its property to be included in the assessment for taxation. When this had been done, then, and not until then, were the assessors authorized to assess its property for taxation under the general law prescribing their duties.

At the time of the passage of the act of 1847, this road was to pass through eleven different counties of Virginia, and perhaps double that number of assessor's or commissioner's districts, as they were then styled. Can it be supposed the legislature intended to leave the question whether the prescribed rate of income had been exceeded, and the company had become liable to taxation, to be decided by twenty different local functionaries in each successive year? The question was a grave, difficult and important one, requiring for its intelligent apprehension and correct solution a knowledge of facts which it was impossible, in the nature of things, a mere local officer like a district assessor could possess. And it can scarcely be supposed that the legislature intended the assessors to jump to conclusions

and leave the company to contest them by twenty different lawsuits in eaeh and every year in which they undertook to make assessments. The local assessors could not possibly know what the receipts of this road, near four hundred miles in length, amounted to, nor what were its working and other expenses; nor could they know what the capital invested amounted to, nor what was the net income, nor what proportion it bore to the capital. No means is provided by which they can get information upon these subjects, and no materials afforded them for determining whether the contingency had happened upon which the company became liable to taxation or not. The act of 1847 itself, as we have remarked, by necessary implication, declares that the contingency had not then happened, but might happen thereafter. No subsequent legislative declaration had been made on the subject, and all that the assessors could do would be assess the property of the company for taxation, because by the act of 1863 the legislature had directed assesment to be made of property of railroad companies not exempt from taxation. He was to assume that the income of this company had exceeded the prescribed rate, and that the company had become liable to taxation without knowing or having any means whatever of knowing the fact, because the legislature had passed an act, directing the property of railroad companies not exempt by their charters from taxation,* to be assessed. It is submitted, that without further legislation no assessment of the property of the Baltimore and Ohio Railroad Company could lawfully be made in West Virginia.

5. That the right to tax under any circumstances, under the laws applying to the subject, is confined to the shares of the stockholders, and cannot be enforced against the property of the company as such.

By the original charter of the company (Act of Maryland of February 27, 1827, § 18,) all the works, property or profits, of every description, belonging to or accruing from said road, were

* At the time of the passage of the act of 1863 the Baltimore and Ohio Railroad was the only railroad that would come within the exception in the act, as it was, it is believed, the only railroad in West Virginia that had any pretense of claim to be exempted from taxation.

declared to be vested in the company thereby incorporated, and their successors forever.

By the Virginia Act of 1847, (§6,) this company was declared (on the acceptence of that act) to be subject to the general Railroad Laws of the State of Virginia, (Act of March 11, 1837,) with respect to that portion of their road then or thereafter constructed within the State. And by that act, (§23,) it was declared that all the works, property, and profits of any company subject to the provisions of that act, should be vested in the *respective shareholders* forever, in proportion to their respective shares.

The difference between the act of 1827 and the last named act, on this subject, cannot fail to strike attention. The former act expressly vests the property, &c., in the company, as such, the last named act vests it in the shareholders, according to their respective shares. Now the whole frame and structure of the act of 1863 rests upon the idea of assessing the property within the State for taxation, against the owners, and it is believed the only exception to this mode is in the case of the arbitrary assessment prescribed in the case of railroad companies. Instead of assessing such property, represented as it is by the stock against the holders of the stock, according to their shares, it directs the assessment to be made just as it would have been made if liable to taxation under the act of 1827, against the company itself as having the property vested in it, when it is in fact vested in the shareholders according to their respective shares. The Court of Appeals say, in their opinion, that the property is vested in the shareholders in their corporate, and not in their individual or natural capacity, and is, consequently, taxable in the name of the company. Such is not the language of the act, nor is it perceived why such a construction should be placed on the terms employed. It would seem a solicism to say that the shares of stock which a man holds in a joint stock company, purchased by him with his individual funds, are held by him in a corporate, and not his individual capacity. He holds his shares as private property, just as anyother belonging to him: the other corporators have no interest in his shares, and cannot control his ownership of them. He

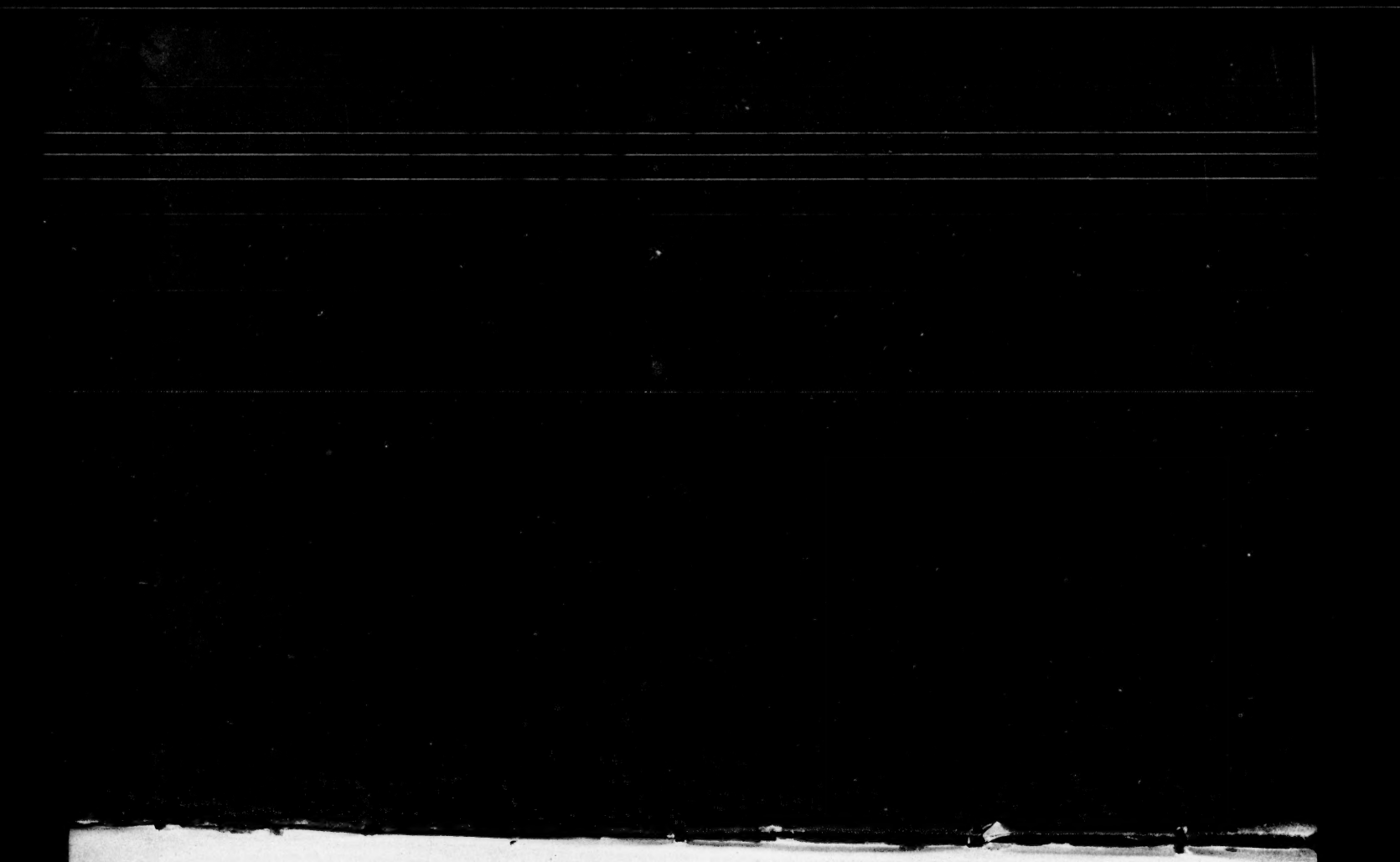
may dispose of them at his pleasure, and may transfer them to a third person, or to the corporation itself. In the latter case, in which the company becomes the owner of shares of its own stock, it might be said that the stockholders hold this stock in their corporate, and not their individual or natural capacity; but in regard to stock purchased by them with individual means, paid for with individual funds, and standing in their individual names, and subject to be disposed of at their individual pleasure, it would seem wholly unmeaning and erroneous to say that such stock belongs to them in a corporate, and not individual capacity; and the sole ground on which the Court of Appeals asserts the right to tax in the name of the company wholly disappears.

It is submitted, that by the act of 1837 and the act of 1847, taken in conjunction, as they must be, the mode of taxation provided for, and agreed on, was by taxation against the owners of the respective shares of the stock; that being in fact the only mode consistent with just and equitable principles of taxation applicable to the subject, as hereinbefore explained; and that it was no more competent for the legislature, by the act of 1863, to change this mode and assess against the company as such, than it was to change any other provision of the compact between the State of Virginia and the company, without the consent of the latter.

6. That according to the true construction of the act of 1847 the contingency had not happened on which the right to exercise the power of taxation had been made by the act to depend.

The seventh section of the act of 1847 subjects to taxation so much of the stock, property and profits, so far as the same might be or accrue with the State of Virginia. The law itself discriminates between the stock, property, and profits held or accrued within the State, and those held and accrued without. It impliedly but necessarily disclaims the right to tax stock or property held without the State, or profits accrued on the capital vested outside of the limits of the State; and it may therefore be reasonably inferred, that the net income referred to in the last clause of the sentence which, when it amounted to six per centum upon the capital invested, was the net income from the

operations of that portion of the road within the State. It can scarcely be supposed that if the income derived from the road in Virginia was less than the prescribed rate, that the State would exercise the taxing power because the profits arising from the road outside of the State exceeded that rate. The plain intent of the act was to tax the stock property and profits so far as the same should be or accrued within the State, but only to tax them when those profits, *i. e.*, the profits accrued within the State exceeded the rate of six per contum per annum upon the capital invested. It supposed that these profits could be discriminated from those accrued outside of the State, and it is in vain therefore to say that the profits accrued are necessarily derived from the whole road, as well the part outside of the State as that within. It is submitted that upon the testimony in the cause, the profits accrued from the operations of the road within the State of West Virginia prior to the year 1864, did not amount to the rate prescribed to authorize the imposition of taxes upon the company or the shareholders.

7. That upon the state of the proofs in the cause, the Court should not have dissolved the injunction without first directing a reference or an issue to ascertain the rate of the net income prior to the year 1864, for which the same was assessed for taxation.

J. H. B. LATROBE,
GEO. H. LEE.
For Plaintiff in Error.